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APPENDIX TO BRIEFS

RELEVANT DOCKET ENTRIES

1 Sept. 2?, 1964. Complaint filed.

Sept. 23, 1964. Summons exit.

Sept. 23, 1964. Plff's. demand for jury trial filed.

2 Oct. 6, 1964. Summons returned: "on 10-1-64 served" and filed.

3 Oct. 21, 1964. Answer filed.

Oct. 21, 1964. Case listed for trial.

4 Nov. 9, 1964. Plaintiff's interrogatories, filed.

5 Dec. 2, 1964. Defendant's answers to interrogatories, filed.

6 Mar. 10, 1967. Plff's. pre-trial memorandum, filed.

7 Mar. 13, 1967. Deft's. interrogatories, filed.

8 Mar. 22, 1967. Deft's. pre-trial memorandum, filed.

9 June 5, 1967. Plff's. answers to interrogatories, filed.

Jan. 18, 1968. Jury and Alternates called and sworn. Trial. Witnesses sworn.

Jan 19, 1968. Trial resumed.

Jan. 22, 1968. Trial resumed.

Jan. 23, 1968. Trial resumed.

Jan. 24, 1968. Trial resumed.

Jan. Eo die: The Jury not having reached a verdict, is excused for the night, to return on 1/25/68 at 10 A.M. and resume deliberations.

10 Jan. 24, 1968. Plffs. requested instructions, filed.

11 Jan. 24, 1968. Deft's. requests for instructions, filed.

Jan. 25, 1968. The jury returns and resumes deliberations.

Eo Die: The Jury not having reached a verdict, is excused for the night, to return on 1/26/68 at 10 A.M. and resume deliberations.

Jan. 26, 1968. The Jury returns and resumes deliberations.

VERDICT: In favor of plaintiff against deft for damages in the sum of $25,000.00 and for punitive damages in the sum of $725,000.00.

12 Jan. 26, 1968. Judgment in favor of plaintiff and against defendant for damages in the sum of $25,000.00 and for punitive damages in the sum of $725,000.00, with costs, filed. (1/30/68 entered—copies mailed 1/29/68).

13 Jan. 30, 1968. Order to furnish lunch for jurors, filed.

14 Jan. 31, 1968. Order to furnish lunch for jurors, filed.

15 Feb. 2, 1968. Deft's. motion for new trial, filed.

16 Feb. 2, 1968. Deft's. motion for judgment notwithstanding the verdict, filed.

17 Feb. 2, 1968. Plff's. bill of costs; verification of bill of costs and notice thereof, filed.

18 Feb. 9, 1968. Plff's. request that deft's. motion for new trial be denied, filed.

19 Feb. 9, 1968. Plff's. request that deft's. motion for judgment notwithstanding the verdict be denied, filed.

20 to
26 Feb. 23, 1968. Transcript of 1/18/68 to 1/26/68 inclusive, filed. (7 VOLUMES)

27 Mar. 6, 1968. Deft's. additional reasons for a new trial, filed.

Mar. 25, 1968. Argued sur deft's. motion for new trial and plff's motion contra. C.A.V.

28 Apr. 12, 1968. Transcript of 3/25/68, filed.

29 Aug. 28, 1968. Opinion, Lord, III, J. and Order DENYING deft's motion for judgment n.o.v.; GRANTING deft's motion for a new trial, limited to amount of punitive damages, unless plff. within 20 days file a remittitur of all punitive damages, etc., filed. 8-29-68 entered & notice mailed.

30 Sept. 3, 1968. Remittitur of plff. of all punitive damages in excess of $250,000.00, filed.

31 Sept. 25, 1968. Appearance of B. G. Segal, Esq. for deft., filed.

32 Sept. 25, 1968. Deft's. notice of appeal, filed. Copy to B. Paul, Esq.

33 Sept. 25, 1968. Copy of Clerk's notice to U. S. Court of Appeals, filed.

Sept. 25, 1968. Supersedeas Bond in the sum of $325,000. with National Surety Corp, as surety and Order approving same, filed.

35 Oct. 20, 1969. Certified copy of judgment and copy of opinion in lieu of formal mandate received from U. S. Court of Appeals reversing the judgment of this court entered 8/28/68 and the case remanded to the District Court for entry of judgment in favor of appellant, with costs, filed.

36 Oct. 21, 1969. Judgment entered in favor of Metromedia, Inc., and against George A. Rosenbloom, with costs in accordance with the Judgment of the U. S. Court of Appeals, filed. 10/22/69 entered and copies mailed.

COMPLAINT FOR DEFAMATION

1. Jurisdiction founded on diversity of citizenship and amount. Plaintiff is a citizen of the Commonwealth of Pennsylvania and defendant is a corporation incorporated under the laws of the State of Delaware.

2. At the time of the commission of the wrongs hereinafter mentioned, plaintiff was a law abiding citizen of the State of Pennsylvania, and had always enjoyed the respect, confidence and esteem of his neighbors as well as of others in the community and has never been guilty of any offense and violation of the law which would tend to lessen the respect, confidence and esteem which he has enjoyed and to which he was entitled.

3. The defendant, Metromedia, Inc., at the time of the committing of the grievance hereinafter set forth, owned, managed, controlled and conducted a radio broadcast station in Philadelphia, Pennsylvania, known as W.I.P.

4. The defendant, well knowing the facts set forth in Paragraph 1 above, with wilful and malicious intent to injure the plaintiff and bring him into public scandal and disgrace and intending to injure and deprive the plaintiff of his good name, fame, credit and reputation, did on the dates hereinafter set forth in the County of Philadelphia, Pennsylvania, falsely, wicked and maliciously broadcast and announce over the radio and airways and cause to be broadcast and announced over the radio and airways false, scandalous, malicious and defamatory libels of and concerning the plaintiff from a period commencing on or about October 1st and ending on or about October 28, 1963, to wit, the plaintiff and his company was a major purveyer and distributor of smut and obscene literature and that the plaintiff should meet harsh penalties, that the plaintiff had committed the crime of pos-

session of obscene literature, a felony under the Pennsylvania criminal statutes.

5. The statements and charges in said broadcasts, so far as they reflect upon plaintiff's character and reputation are false.

6. The plaintiff had never at any time been guilty of the crime of possession of obscene literature, nor was he ever an accessory to, nor aided and abetted any such criminal acts, nor was he ever guilty of any other violation of the law but he has at all times been a peacable and law abiding inhabitant of the community in which he has resided from the date of his birth until the present time.

7. The defendant, Metromedia, Inc. well knew at the time said charges and statements above referred to were made, that they were untrue, but well knowing the premises and for the purpose of wantonly and wickedly injuring the plaintiff. did illegally, falsely, wickedly and maliciously broadcast of and concerning the plaintiff, the defamatory statement hereinbefore set forth and malicious libels.

8. The plaintiff further avers that the said radio station known as and called W.I.P. and broadcasting said false, scandalous, malicious, defamatory and libelous statements were broadcast and published by the said defendant, the Metromedia, Inc. in the County of Philadelphia, Commonwealth of Pennsylvania, and elsewhere, on the said days hereinbefore mentioned and was widely published and broadcast among and heard by the plaintiff's neighborhood and friends and divers other persons.

9. By reason of said broadcast, publication and circulation of said false, scandalous, malicious, defamatory and libelous statements of the said defendant, the plaintiff had been brought into scandal and reproach, and has been held

up to odium, scorn and contempt among his neighbors, by his acquaintances, and other good citizens, and is suspected to have been guilty of the crime heretofore mentioned to have been charged and imputed in consequence of which, the plaintiff has suffered in his business, his reputation, feelings and peace of mind to his great financial loss and damage.

10. As a result of the aforesaid libels of the defendant, many persons, who before and at the time of the defendant's libel had been used and accustomed to deal with the plaintiff in his business of distributing nudist magazines and who otherwise would have continued so to deal with the plaintiff, have since the time of the defendant's libel, wholly neglected and refused to continue to do business with the plaintiff, to the latter's great special financial loss and damage. The plaintiff demands judgment of the defendant for these special damages in the sum of $100,000.00.

WHEREFORE, the plaintiff claims damages from the defendant, in an amount in excess of $500,000.00 and costs.

BENJAMIN PAUL,
Attorney for Plaintiff

Affidavit

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } ss.:

GEORGE A. ROSENBLOOM,

being duly sworn according to law, deposes and says that he is the plaintiff in the aforementioned

COMPLAINT FOR DEFAMATION

and that the facts set forth are true and correct to the best of his knowledge, information and belief.

GEORGE A. ROSENBLOOM

Sworn to and subscribed
before me this 23rd day
of September A.D., 1964.

BENJAMIN ZION
Notary Public, Philadelphia, Pa. Co.
My Commission Expires Jan. 23, 1967

ANSWER

First Defense

Defendant admits the allegations contained in paragraphs 1 and 3 and the allegation that it broadcasts through Station WIP which is alleged in paragraph 8; avers that it is without knowledge or information sufficient to form a belief as to the truth of the allegation as to the publication being heard by plaintiff's neighbors and friends referred to in paragraph 8 and the allegations in paragraph 9 with respect to the effects of the broadcast; and denies each and every other allegation contained in the complaint.

Second Defense

The complaint fails to state a cause of action upon which relief may be granted.

Third Defense

The broadcasts were truthful reports concerning public activities of the police and of proceedings in connection with the administration of justice.

Fourth Defense

The broadcasts were privileged as constituting fair comment on matters of public interest.

Fifth Defense

The broadcasts were not malicious and, therefore, were privileged under the First Amendment and the Fourteenth Amendment of the Constitution of the United States.

Fox, Rothschild, O'Brien & Frankel
By Israel Packel

Attorneys for Defendant
1401 Walnut Street
Philadelphia, Pennsylvania

EXCERPTS FROM TESTIMONY

[8]

PAUL RUST, sworn.

DIRECT EXAMINATION

By Mr. Paul:

Q. Mr. Rust, who is your present employer?

A. Immediate employer? Is—

Q. Yes.

A. —Is Mr. David Kroniger, who is General Manager-Vice-President.

Q. Excuse me, sir.

The company you work for presently?

A. Metromedia, Incorporated.

Q. And Metromedia, Incorporated, owns WIP Radio here in Philadelphia; is that correct?

A. That is correct.

Q. And you work there?

Mr. Packel: May—may I suggest that the witness is not keeping his voice up.

The Court: I would think—

Mr. Packel: If he talks toward the jury, —

The Witness: All right.

Mr. Packel: If you face the jury as you answer the questions so they can understand what you are saying.

The Court: Mr. Rust, do you see that lady all the

[9]

way up in the corner of the back?

The Witness: Yes.

The Court: If you talk to her then everybody in between ought to be able to hear you—that is, if she can.

By Mr. Paul:

Q. And your offices here are at—on Walnut Street—that is 19th and Walnut, is it not?

A. Yes.

Q. And WIP Radio, that broadcasts in Philadelphia; that is 610 on your radio—on the radio dial here in the area; is that correct?

A. Yes.

Q. And your function at a radio station is what, sir?

A. I am news director.

Q. And how many people in your department?

A. A total of eight, including myself.

Q. Does that include announcers and script writers and typists when you say "eight"?

A. That is the total number in the news department.

Q. Well, what does that number comprise?

A. Well, we have no typists; we have no announcers as such. Our men are combination men—that is to say, they are a combination of newsmen and announcers.

[10]

Q. I see.

A. In other words, they produce their own newscasts and broadcast the end product they produce.

Q. Sir, what area does WIP cover, geographical area, in broadcasting?

A. It covers a good part of South Jersey. It covers several counties in Southeastern Pennsylvania. The exact number of counties I cannot tell you in the primary area.

Q. Well, in the primary area, sir, how far west would you say that goes?

A. I would have to get a coverage map to actually tell you specifically and I doubt that I can give you a general indication.

Q. What is the wattage power of your radio station?

A. 5000.

Q. 5000? Does that wattage power indicate to you the number of miles the—your radio broadcasts can travel?

A. Not necessarily. It depends on your pattern.

Q. Do you know of your own knowledge how—the most remote places that your listeners come from?

A. Well, the best, to give you an example, I have—I have gone to Gettysburg, driving, and gone as far as Harrisburg. We cover the shore points, Atlantic City and

[11]

those areas, and we cover New Jersey. We cover the Trenton—Trenton area.

Q. You could be heard in Trenton?

A. Yes.

Q. Sir, Metro—how long have you been with Metromedia?

A. Eight years.

Q. Eight years.

A. Eight years come April.

Q. And have you been a news director for those eight years for WIP Radio?

A. Yes.

Q. And you are very familiar with their activities—I am certain of that—is that correct, sir?

A. Well, what do you mean by that?

Q. The radio activities, the broadcasting.

A. Locally?

Q. Yes.

A. Yes. I would say so.

• • •

By Mr. Paul:

[12]

Q. WIP Radio is—broadcasts how many hours a day here in Philadelphia?

A. 24.

Q. 24; was that also true between the times of October

[13]

20—October 1, 1963 and October 28, 1963? Was it 24 hours a day?

A. So far as I know, yes.

Q. Well, were you there at the station during that time, October 1, 1963? Were you news director then?

A. So far as—yes; I was news director, yes.

Q. Do you have an assistant? Is there an assistant news director?

A. At the present time, no.

Q. Was there then on October 1, 1963?

A. Yes.

Q. Who was that?

A. David Crane.

Q. Is he in Philadelphia today? Does he still work here?

A. No.

Q. Then after the assistant news director you just had—are there other classifications to your job outside assistant

news director? The other people who work for you, what classifications are they?

A. You mean at that time, after the assistant left?

Q. Yes, at that time, around October 1, 1963, during that period between October 1, 1963 and October 28, 1963.

A. Were there additional classifications of jobs beyond—

Q. Yes.

[14]

A. —news director and assistant news director?

Q. Yes. For instance, announcer, writer, newscaster?

A. Newsmen.

Q. Just newsmen?

A. Yes.

Q. Did John Paul Weber work with you during this time, October 1, 1963, and October 28, —

A. Yes.

Q. — 1963?

And what was his job?

A. Newsman.

Q. Newsman; and he also broadcasts various news reports; is that correct?

A. Yes.

Q. Nathaniel Wright, you say was your assistant?

A. No.

Q. What was Nathaniel Wright's job?

A. Nathaniel Wright worked on a part-time basis in the newsroom. He was primarily assigned as a personality on weekends and we had him four days a week. He was in addition to the regular newsmen.

Q. In addition, sir?

A. In addition to the regular newsmen.

Q. Now, sir, from October 1, 1963 through this time, October

[15]

28, 1963, there were a series of broadcasts concerning certain arrests in—certain arrests concerning obscene literature and George A. Rosenbloom, were there not?

A. Yes.

Q. O.K.; and do you have any tape recordings of these broadcasts presently?

A. No; I do not.

Q. Did you ever have at any time?

A. No; I did not.

Q. All right; now—

A. Now, when I—I—I would like to qualify that to this standpoint, that at that time we had what was called a Soundscriber and we held those. This Soundscriber recorded everything for a 24-hour period on the station. We held those at that time for I think a month or two months, because we had to reinstitute that tape back into service again. We didn't maintain them for the length of time.

So when I—when you asked me the question, "Did we have any tapes?" I can say yes, but for that limited period of time we had tapes of the entire 24-hour program.

• • •

[17]

Q. Now, but during this, the time, your broadcasts were made by the announcer from certain scripts, were they not?

A. That is correct.

Q. In other words, the scripts were prepared in advance and then the announcer would sit down and announce the news on the written material he had in front of him;—

A. Yes.

Q. —is that correct?

A. Uh-huh.

Q. Now could you tell the jury how these scripts were prepared—prepared—from where you got the information?

[18]

A. You mean any script you are talking about on any news story?

Q. Yes, generally, during that time.

As I understand—I am asking the question because I understand you have various sources. You have sources for your making up your news. For instance, you have a teletape machine in there from AP, from the Associated Press, do you not?

A. Yes.

Q. At that time you did.

What other service do you have? Wire services I think they call them;—

A. That is right.

Q. —is that correct?

What other services did you have?

A. Well, we have many sources of news for gathering information.

We have news sources. We have the wire services, of course. We have voluntary information—people who see things will call us and let us know—which we often corroborate, check out.

We have routine calls we make to various points in the area, key points of concern.

I think they generally classify the incoming

[19]

sources of information to our newsroom.

Q. Now, the material you get over the wire services, they come out pretyped already; you merely tear them off and attach them to a page and use them as a script, is that correct, a part of your script; is that correct?

A. That is correct, with the exception—exception of the fact that we don't always—we will edit that copy or rewrite that copy.

Q. O.K.; and information gathered by use of the telephone is typed into from—is reproduced through a typewriter and placed in the script also, that you deem worthy, newsworthy; is that correct?

A. Any information, factual information we gather, that is corroborated, we naturaly put down if it is worth putting down and incorporate that into script, yes.

Q. Now, can I assume you have your own sources for what would be commonly known as news tips, people on the spot, for your—of some news event that call up, call somebody in your office on the phone and tell you what is going on and somebody will make a decision as to whether that is newsworthy and get into it a little further; is that correct? You have various callers?

A. Yes; we do. We have—

Q. You do have?

[20]

A. We have a great deal of public response to our station and they volunteer the information to us which we evaluate. If we feel it is acceptable we will check it out and corroborate it and use it.

Q. Do you have reporters, as such, on the streets covering various incidents?

A. All of my men are reporters. If the occasion arises we will send the individual to the scene of a story. We cover various news conferences in the city, spot stories, or whatever.

Q. You don't have reporters that have a general beat—for instance, the District Attorney's office,—

A. No; I do not.

Q. —who stay there; you don't have that type?

A. No.

Q. You mentioned corroborating or checking on some of your sources of news information.

How do you do that?

Is there any particular way you do that or any particular method that you employ?

A. Well, we either call the source, for one thing, we call —to cite an example, I suppose, of a story yesterday, we had a spot story such as the fire yesterday, the six-alarm fire, and we would actually get that over police monitor,

[21]

a fire monitor, rather. At the same time we were receiving untold numbers of calls, phone calls.

There is very limited need for corroboration of a story such as that.

Cases of arrest made by the D.A.'s office why, of course, we would call the D.A.'s office or we will call the jail desk or we will call a particular police division.

We might call the attorney involved and get his reaction to whatever.

There are unlimited number of sources to contact for corroboration of a story.

Q. Now, then, principally what you do, if I am correct, is rely on the spoken word, what somebody else tells you; you don't check documents, for instance, in the commission of a crime?

A. For the most part, yes.

Q. You are relying on what a police officer tells you.

A. For the most part, yes.

Q. You don't actually go down and see yourselves; is that correct?

A. That is correct.

Q. And this is made—I would assume this would be in keeping with your general policy so that as you hear the

[22]

news and it is timely, which is very important to you, am I correct, you put it right out over the air and your job would be to check it as quickly as possible and get the information out to the public as quickly as possible?

A. The immediacy is not the most important factor in the news business. The most important thing is getting it factual, factually, as quickly as possible, but for the sake of expedition we certainly don't deny that.

Q. Well, certainly, sir, you wouldn't be able to use an item of news if it was two days old and it took you two days to check it out; you wouldn't have any—it wouldn't be newsworthy any more, would it?

A. That is possible.

Q. Sure.

A. We might wait. We might wait two days to check it out.

Q. For instance, if a man had committed a heinous crime, rape or robbery, you wouldn't report it two days later, would you?

Mr. Packel: Your Honor, I will object. I think we are going too far with these hypothetical situations.

The Court: Sustained.

I really think, Mr. Paul, that we are interested in what happened in this case.

Mr. Paul: Yes. That is right.

[23]

The Court: We will get to that?

By Mr. Paul:

Q. During these broadcasts from October 1, 1963 to October 28, 1963, in response to questions which I had propounded to your counsel in depositions you presented me with certain scripts which were used to make these radio broadcasts, did you not?

A. Yes.

Q. Right; and I asked you to bring these scripts with you in the courtroom today, did I not?

A. Yes.

Q. And did you bring them with you?

A. Yes.

Q. O.K.; do you have them available at this time?

Mr. Paul: I am going to hand them up and I have a duplicate set.

By Mr. Paul:

Q. Those scripts you have there, could you tell the jury what—what period of time, what dates they cover from beginning to the end, just the beginning date and the ending date?

A. It is October 1, of 1963 to—we have one here 11/1/1963.

Q. I think you testified earlier that those—there are various news reports in there concerning George R. Rosenbloom

[24]

and this arrest by Captain Ferguson concerning obscene material; is that correct?

A. Yes.

You say, "and the arrest by Captain Ferguson?"

Q. Yes.

A. Yes.

Q. Reports concerning—

A. Yes.

Q. —these arrests.

Now do you know of your own knowledge or would there be any records which would indicate that subsequent or after 11/1/63 there were any news broadcasts about George R. Rosenbloom?

Mr. Packel: I will object, Your Honor.

The reason for the objection is in pretrial interrogatories the only things relied on were from 10/4/63 to 11/1/63. That is in the answers to interrogatories.

Mr. Paul: Yes, sir. He is correct when he says that, sir, but I don't ask him for the—the reasons. I am still relying on this.

The answer may be "No" and that may be the end of it.

The Court: Can you read the question back, Mr. Bosta.

[25]

(Last question read.)

The Court: Sustained.

By Mr. Paul:

Q. Well, let me ask you this: George A. Rosenbloom was tried in a—have you followed George Rosenbloom's—

Mr. Packel: May I see Your Honor at side bar? I think he is doing something indirectly which he shouldn't do.

The Court: All right.

(At side bar:)

Mr. Paul: Actually, sir, what I was doing was trying to dispose of the lesser issue, sort of bringing the cart before the horse, and my question was designed to find out if there were additional reports concerning George A. Rosenbloom's innocence. This—these reports are after a trial and he was tried and found innocent and I want to know if they said anything else to mitigate their own damage.

The Court: You mean if the defendant said anything else.

Mr. Paul: Yes.

The Court: I think that is fair.

Mr. Packel: Well, no, Your Honor; the fact

[26]

that he was found—and I don't know whether he was found not guilty or whether it was thrown out on some technical ground—but I think that is immaterial and it has nothing to do with this case.

Remember the burden of proof in finding him guilty of obscenity is entirely different.

The Court: Oh, yes; I agree with that, but I think that would bear on the issue of damages,—

Mr. Paul: And fair comments, sir.

The Court: —if the defendant, having made any other broadcasts as to his arrest and the charges failed to say anything about an acquittal, if there was one.

Mr. Packel: This is not pleaded. There is no pleading of damages on this ground or anything of that sort.

The Court: No—I do not think it has to be. I think that will go to the issue of damages.
It might even be concerned on the question of malice.

Mr. Packel: Well, if that is Your Honor's position I will respect it, of course; I will not even except to it, but I just felt that he is trying to get indirectly in—I don't know whether he had later

[27]

broadcasts pertaining to that.

The Court: I will watch that.

(End of side bar discussion.)

By. Mr. Paul:

Q. Sir, my question, if I may rephrase it, sir, principally deals with these scripts, as you indicated, are news reports concerning George R.—A. Rosenbloom's arrests.

After 11/1/63 do you know—are there any further comments about George A. Rosenbloom concerning his trial or anything else that happened to him?

A. I have no knowledge.

Q. Did you have an occasion to search your records to see if there were any other news reports concerning George

A. Rosenbloom after this date?

A. No.

Q. Now, if I may, sir, your first copy, your first news report is 10/1 and that would be 10/1/63; is that right, sir?

A. Right.

Q. May I direct your attention to these copies.

And what is the time?

A. That is 12:00 noon.

Q. And this script that you are alluding to now would be—purport to be the first broadcasts about these arrests; is

[28]

that correct?

Mr. Packel: I will object, Your Honor.

I don't see the pertinency of what happened on 10/1 when his complaint is about what happened on 10/4.

I don't think it is too material and I think we just lose time going into these preliminary matters.

Mr. Paul: Well, sir, it goes toward malice and it would be a course of conduct, the repetitive aspects.

The Court: You were asked specifically what you were relying on—

Mr. Paul: Yes.

The Court:—and you began with 10/4.

Mr. Paul: Yes.

The Court: I will sustain the objection.

Mr. Paul: Is Your Honor ruling that I may ask no questions concerning these scripts prior to 10/4?

The Court: No—I am ruling that you cannot.

Mr. Paul. Yes.

By Mr. Paul:

Q. Well, let me direct your attention to the script bearing on the news report over WIP Radio dated 10/4/63, 6:00 P. M.

A. Was that 10:00 P. M.? Is that what you said?

Q. 10:00—

[29]

Mr. Packel: 6:00 P. M.

The Witness: 6:00 P. M.

By Mr. Paul:

Q. 10/4/63, at 6:00 P. M.

Would you let me know when you have that, sir

A. Pardon me?

Q. Do you have that in front of you?

A. Yes.

Q. Now, was that script that you have before you used as a source of your—the radio broadcasts at that time, at 6:00 P. M. on 10—does that say 10/4/63 at 6:00 P. M.?

A. Right.

Q. May I see it, sir?

Thank you.

Did you supply me with a copy of that document in response to my questions in during interrogatories?

A. Of this particular document?

Q. Yes.

A. So far as I know you have everything that you asked for.

Mr. Packel: May I clarify the matter?

I—he furnished them to me and I furnished them to counsel.

Mr. Paul: Well, may I have this script marked

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as Plaintiff's Exhibit 1, sir, and I intend to mark these scripts as Plaintiff's Exhibits 1, 2, and 3. These will be the documentary evidence and that will be all, sir.

Now may I have this script marked plaintiff's evidence, plaintiff's evidence P-1.

(Newscasts dated 10/4/63 were marked Exhibit P-1 for identification.)

Mr. Paul: May I see it just a moment, sir.

Mr. Packel: May I say, if there are any discrepancies, then they were in my office, because as they were furnished to me is the way I had my girl furnish them to counsel.

I don't know if there are any discrepancies, but, if there are, I want to make clear they were in my office.

Mr. Paul: May I see that again, sir, just for one moment, if Your Honor will indulge me once.

Is that it?

Mr. Packel: No. You have got the wrong one. You got one like this.

By Mr. Paul:

Q. Would you read to the jury what that script says about George A. Rosenbloom.

The Court: Is this the one of October 4, 1963,

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Mr. Rust?

The Witness: This is 10/4/63, at 6:00 P. M.

The Court: Thank you.

The Witness: "The Special Investigations Squad raided the home of George Rosenbloom in the 1800 block of Vesta Street this afternoon. Police confiscated 1000 allegedly obscene books at Rosenblom's home and arrested him on charges of possession of obscene literature. The Special Investigations Squad also raided a barn in the 2000 block of Welsh Road near Bustleton Avenue and confiscated 3000 obscene books. Captain Ferguson says he believes they have hit the supply of a main distributor of obscene material in Philadelphia."

By Mr. Paul:

Q. Now, is there something on the cover of that script that relates to George A. Rosenbloom?

A. There is a headline, "City Cracks Down On Smut Merchants."

Q. Now, when I requested these scripts through inter—through my discovery procedures, did you supply everything you had that I requested to your attorney requested and was that one of the things that you supplied?

A. This I am sure.

Q. Yes.

[32]

A. Yes.

May I just interject a thought here on this headline?

Q. Yes.

A. I am not sure that—whether this headline refers to the—the story on Rosenbloom or another story in the same newscast.

Q. Well, is there another story concerning obscene literature in the same newscast?

A. Yes.

Q. May I see it, sir?

Sir, when the announcer used—who was the announcer that used that script; do you know?

A. William Paine.

Q. William?

A. Paine.

Q. Is his name marked on the—how do you know that?

A. His initials, B. P.

Q. Now where do they appear?

A. Right here.

Q. At the top?

A. Yes.

Q. And do you know that he made the broadcast in substantially the same words that appeared in this script?

[33]

A. Well, I can't—I can't recall, but my newsmen are ordered not to ad lib.

Mr. Packel: I am sorry. I don't think the—that could be heard. I heard it, but some of the others possibly—

The Witness: My newsmen are told not to ad lib.

By Mr. Paul:

Q. And what do you mean by that, ad lib?

A. A rare exception would occur where they might.

Q. What do you mean by ad lib, sir?

A. Ad lib is to—ad lib is to use words other than that which is pertained on the script or on the script. This is—

Q. Well, would you consider it ad libbing if the words were abbreviated? You wouldn't expect the announcer to read an abbreviated word; he would complete the word in his own—announce it as a completed word, wouldn't he, sir? That wouldn't be ad libbing, would it?

A. Abbreviation?

Q. Yes. For instance—

Mr. Paul: Well, I will withdraw that question.

By Mr. Paul:

Q. And this material indicated in this script the exact

[34]

words that would go over the air; is that correct?

A. Yes.

Q. O.K.; what—what was the next broadcast after that one in sequence of time?

A. At 6:30 the same day.

Q. And that is 10/4/63 at 6:30?

A. Yes.

Q. And do you have—you have that script with you, do you not?

A. Yes.

Q. May I see it, sir.

Now, also did you turn this script over to your attorney to give to me in response to my request for these scripts?

A. All of this material, all of the material that I have—

Q. All of it, yes.

A. —on your request was turned over, yes.

Q. Now, this script says at the top—am I reading it correctly? What is that, 6:30 P. M.?

A. Right.

Q. And there are some initials after it.

A. Right.

Q. What is that?

A. Those initials are Raymond Quinn's.

[35]

Q. That would be the announcer?

A. That would be the newsman, right.

Q. And this says 10/4/67. Am I correct? Am I reading that? Am I reading it incorrectly?

A. It is doubtful it is '67. It is '63, 10/4/63.

• • •

[37]

Mr. Paul: May I resume, sir?

The Court: Yes; go ahead.

Mr. Paul: We were alluding to another script, sir. May I have that marked P-2 for plaintiff's identification.

(Newcast of 10/4/63, 6:30 P. M., was marked Exhibit P-2 for identification.)

By Mr. Paul:

Q. And you said, sir, from the—the top, the announcer, that you could—you could tell who the announcer was and that was who, sir?

A. Raymond Quinn.

Q. Is he still announcing for WIP Radio today?

A. No. He is not.

Q. Where is he now?

A. I don't know where he is now. He left our station, went to—

Mr. Packel: Packel: You are letting your voice

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fall.

The Witness: He left our station, went to KYW, and after that I don't know where he went.

By Mr. Paul:

Q. Do you know when he left your station?

A. When?

Q. Yes.

A. I could let you know, I don't know off the top of my head, no.

Q. All right; now, in this script that you are alluding to, 10/4/63 at 6:30 P. M.; is that it?

A. Yes.

Q. Will you read in there, sir, what it says about this incident.

A. "Captain Clarence Ferguson's Special Investigations Squad this afternoon raided the home of George Rosenbloom in the 1800 block of Vesta Street and confiscated 1000 allegedly obscene books. Rosenbloom was arrested and will be given a hearing tomorrow in Magistrate Raymond Malone's Court. Rosenbloom is free on bail at the present time from a previous charge of distributing obscene material. This Special Investigations Squad also raided a barn in the 2000 block of Welsh Road near Bustleton

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Avenue and confiscated another 3000 obscene books. Police believe they have hit the supply of a major distributor of obscene literature in Philadelphia."

Q. Now, sir, can you tell me how that information was corroborated or verified?

A. 1963 is a long time ago.

So far as the verification is concerned I am not sure. I do know this, that we were certainly in contact by phone with Captain Clarence Ferguson on this matter.

Q. So that your best information is that this verification, this was merely repeating what Captain Clarence Ferguson said; is that correct? There would be no other way of knowing what had happened?

A. As I recall, and I am not certain—this is pure and simple recollection—I believe I recall having received a phone call, the fact that police had entered the area.

Now this may have been prior to or after the time we got in touch with Captain Clarence Ferguson.

Now, in order to find out who was making the raid I am sure I must have had to contact several agencies before nailing it down to Captain Clarence Ferguson's Special Investigations Squad and then, of course, we contacted him.

Q. So the actual verification is, as you say, Captain

[40]

Clarence Ferguson?

A. Captain Clarence Ferguson, yes.

Q. Did you check any other sources to see if Mr. Rosenbloom, in fact, was a major distributor of obscene literature in Philadelphia or a major distributor of anything in Philadelphia?

A. No.

Q. Incidentally, who determines what is newsworthy and what is not newsworthy?

A. It is the judgment of the individual newsman.

Q. So if something of importance comes along he can just put it in the script then and announce it over the radio without consulting you; is that correct?

A. Well, the individual newsman either hangs or falls on what he produces.

If there is any question, and I am there, why they naturally consult me.

If there is a major question on the part of the individual newsman, if there is question, he always says—I say, "If there is doubt, don't," and for the most part the follow this.

Q. Are there any at that time—I am addressing myself to this time—where there any major policies giving him guide posts for his discretion or what he should put over the air

[41]

or what he shouldn't put over the air as far as news information goes, any definite policies as to what type of information, let us say, should not go over the air?

A. Well, I think—I don't know that I can actually answer that.

We have a continuing policy, and as pertains to this specific story, it is not like a—not unlike any story of a charge and arrest.

Q. Well, do you have any specific policies which would govern mentioning people's names, persons' names who are arrested?

A. Of course; making certain that the individual named, that the name is correct.

Q. For instance, checking with the District Attorney or any places that are prerequisites to check—for instance, the police and the District Attorney's Office?

A. If the District Attorney at that time is directly involved naturally we will contact him for additional information.

Q. How about checking with the person who was arrested himself to get his side of the story? Do you have a policy concerning that?

A. We will contact as many sources as we possibly can on any kind of a story.

Q. Do you know that prior to this broadcast which you just

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read if George Rosenbloom, the defendant himself, was contacted?

A. This I don't know.

Q. Well, there is nothing in that script which would indicate George Rosenbloom's side of the story, is there?

A. No.

Q. So that the indication would be that anything announced from the script, anything announced over the air would not be George Rosenbloom, anything that George Rosenbloom would have to say concerning his arrest; otherwise it would have been written in that script; is that correct?

A. That is correct, I would think.

Q. Now, sir, your next radio broadcast concerning this incident was when?

A. 8:00 P. M., same date, 10/4/63.

Q. And do you have that, that script, with you also?

A. Yes.

Mr. Paul: May I have this marked P-3 for identification.

(Newscast of 10/4/63, 8:00 P. M., was marked Exhibit P-3 for identification.)

By Mr. Paul:

Q. Would you tell us from that script who the announcer was?

A. Gordon Thomas.

Q. What was that name, sir?

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A. Gordon Thomas.

Q. Is he with your station today?

A. Yes.

Q. And what is indicated in that script? Would you read to the jury about this arrest of George Rosenbloom?

A. Do you want this read?

Q. Yes, please.

A. "In the WIP area Captain Clarence Ferguson of the Special Investigations Squad reported the arrest of 42-year old George Rosenbloom of 1852 Nester Street this afternoon on charges of possessing obscene literature. More than 4000 reportedly obscene books were picked up during this afternoon's raid on Rosenbloom's home and from a large barn which he rents. Captain Ferguson said the suspect was a source of supply, one of the main distributors of the literature. This arrest follows the confiscation earlier today of what attorneys called hard core pornography from two Baltimore men, John Brozzi and Russell Labue. Labue and Brozzi were released in bail totalling $35,000."

Q. Now I would take it that that announcement from this script came over the radio in that exact fashion; am I correct?

A. Yes.

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Q. Now, what you read was one entire paragraph, was it not?

A. Right.

Q. What does the arrest of those two men, John Brozzi and Russell Labue, in hard core pornography have to do with George R. Rosenbloom?

Mr. Packel: If Your Honor please, I will object. The thing speaks for itself.

The Court: Sustained.

By Mr. Paul:

Q. In your script that relates to—it states, "Attorneys called hard core pornography." What, if—do you know—do you have any indication what attorneys called this hard core pornography?

Mr. Packel: I will object, Your Honor, because that is referring to an entirely different matter and not the issue before the Court.

The Court: Overruled.

By Mr. Paul:

Q. Answer my question.

A. Yes. These I am sure were from the District Attorney's Office, the attorneys mentioned here.

Q. Well, you say you are sure? What? What makes you so sure?

A. Well, it would have to be the—the District Attorney's Office. It certainly wouldn't be the—

[45]

Q. Well, you are guessing, sir; is that correct?

A. I would say more than guessing. I would—I can think of no other attorneys who would say that other than Assistant D.A.'s.

Q. Well, do you know if anybody called up any Assistant District Attorneys and got their names and reported to verify this information?

A. Well, I think in earlier newscasts during this series—and particularly on this day—you will find earlier studies reporting to this, the arrest of Brozzi and Labue,—

Q. Is that in the same script?

A. —and I think we quoted that time—we quote the District Attorney at that time, not in this story, but earlier in this day. You will notice it says, "The arrest follows the confiscation earlier today."

Q. Well, now, sir, in this what you have just said I take it your own verification is Captain Clarence Ferguson; is that correct?

This what you just read, your only verification for corroboration is Captain Clarence—Captain Clarence Ferguson; am I correct?

A. At this time, as far as I know, I would say yes.

Q. Do you have any other records which would indicate otherwise?

[46]

A. No, no.

Q. Now, in other words, sir, what this would indicate would be that you would get the statement from Ferguson, type it out, and announce it over the radio?

Mr. Packel: I will object, Your Honor, as repeating time and again and he is just being argumentative.

The Court: Sustained.

By Mr. Paul:

Q. You have another script, sir, of your next broadcast concerning this incident.

A. This is 10/4/63 at 9:00 P. M.

The start—let's see—

Q. Does that script have anything in it relating to this incident?

A. No.

Q. Your next broadcast was when, sir?

A. At 9:30 P. M.

Q. And does this have anything in it relating to this incident?

A. Yes.

Q. What does that say, sir?

Mr. Packel: I will object.

This was not alleged as one of the items. It is just a repeat and it is not alleged.

[47]

The Court: Sustained:

By Mr. Paul:

Q. Your next broadcast, sir?

A. 11:00 P. M.

Q. And does that have anything in it concerning this incident of George R. Rosenbloom—or, A. Rosenbloom?

A. Yes.

Q. Who made the broadcast? Can you tell from that script?

A. That was Raymond Quinn.

Mr. Paul: May I have that marked for identification P-4.

(Newscast, 10/4/63, 11:00 P.M., was marked Exhibit P-4 for identification.)

By Mr. Paul:

Q. Would you read, sir, what it says concerning this incident.

A. "Captain Clarence Ferguson's Special Investigations Squad this afternoon raided the home of 42-year old George Rosenbloom in the 1800 block of Nester Street and confiscated 1000 allegedly obscene books. At

the same time the squad also raided a barn Nester rented on—"

This is a—this is the way it is written, but that is what it says.

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". . . a barn Nester rented on Welsh Road in which they picked up another 3000 allegedly obscene books. Rosenbloom is free on $1000 bail from a previous raid on newsstands in the city last Tuesday. He will be given a hearing tomorrow on charges of possession of obscene material."

Q. Now, sir, what did you just have to correct? You said there was something that was incorrect here.

A. "also raided a barn Nester rented."

Q. So obviously that wasn't the way it was broadcast; it had to be corrected; the announcer had to correct it, Raymond Quinn, just as you did there; is that right, sir?

A. It is—I would presume he caught that error on the air.

• • •

[50]

By Mr. Paul:

Q. Well, I would like to know if you—if you stressed George R. Rosenbloom in this area of the broadcast for any particular reason.

Why did you place it in that order after several other reports? Why first? Why not last? Is there any particular reason?

A. Well, as a matter of fact, it was last.

Q. It was last, sir?

A. I have it listed as last in my sheet, yes.

Q. Does your sheet—does your sheet indicate the order of—the order of—

A. Yes.

Q. —in the way it would be broadcasted over?

A. Yes, sir.

Q. You have nothing following about a clip from United Press International?

A. Oh, I am sorry. Yes. There is a—

Q. There are two additional items after that; isn't that right, sir?

[51]

A. Yes. Right. Excuse me.

Q. So it wasn't really last, was it, sir?

A. No. I didn't see this in back.

Q. Your next—that has been marked, has it not?

A. Yes.

Q. That is P-4.

May I have—when is your next news broadcast, sir?

A. 11:30, 10/4, newsman—

Q. Does that have anything relating to George R. Rosenbloom in it also?

Mr. Packel: I will object.
That is not one of the listed items.

The Court: Sustained.

By Mr. Paul:

Q. Your next news broadcast, sir?

A. Well, there were none at—

Q. For that day?

A. At 11:30.

Q. And you went to the next day; is that right, sir?

A. That is right.

Q. What was your—that is 10/5/63; is that correct?

A. Yes.

Q. And what was your first broadcast that day?

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A. 1:00 A. M.

Q. And at that time did it have anything related to this incident?

A. Yes.

Q. Who makes the—who was the announcer?

A. Gordon Thomas.

Mr. Paul: May I have that marked, document marked P-5 for identificition.

(Newscast 10/5/67, 1:00 A. M., was marked Exhibit P-5 for identification.)

By Mr. Paul:

Q. Now would you read to the jury what it says about this incident.

A. "A man arrested Friday by the Special Investigations Squad of Captain Clarence Ferguson is believed to be one of the main sources of obscene literature in Philadelphia. A hearing will be held today for George Rosenbloom of the 1800 block of Nester Street before Magistrate Raymond Malone on charges of possessing the literature. Rosenbloom was picked up Friday with about a thousand of the reportedly obscene books on hand. Captain Ferguson said that police may have hit one of the major sources of supply."

Q. Now, sir, do you know how they corroborated or investigated

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or checked out the fact that—besides talking to Captain Ferguson, that Rosenbloom was one of the major sources of supply?

Mr. Packel: Your Honor, I object.

We are repeating the same thing. Just as these are news stories repeated by the half hour or hour, he is inclined to just take up time by repeating the same question.

Mr. Paul: It is somewhat different—different.

The Court: It is a different thing here, I think.

Mr. Packel: No. It is the same story, Your Honor.

The Court: It is the same story, but he is asking now specifically as to the source that he was a major source of supply.

Mr. Packel: Which was the same question asked previously, Your Honor.

The Court: I will permit it.

By Mr. Paul:

Q. Will you answer that question, sir.

A. Would you repeat the question, please?

Q. How did you check out the facts other than talking to Captain Clarence Ferguson that George Rosenbloom was the

[54]

major source of supply as indicated in this broadcast?

A. Well, the chances are by this time, after having many hours had passed, we certainly attempted to contact the office of the District Attorney and it is a good possibility that we had contacted the District Attorney's Office.

Q. Well, you don't know that for a fact, do you, sir?

A. No; I don't.

Q. And if you did contact the District Attorney's Office would you know what they said about it? Did they verify

this information or was there any indication that they did?

A. Well, if we had contacted the District Attorney's Office we would have been placed in touch with the individual who was involved in the case.

Q. Well, do you know what individual was involved in the case?

A. No; I don't.

Q. Do you know what branch of the District Attorney's Office would handle this case? Do you know who you would—

A. No.

Q. You can't answer?

A. No, no, no. We would be placed in touch with the attorney involved.

Q. Then, as a matter of fact, sir, you don't even know the names of the detectives or the Assistant District Attorneys

[55]

involved in prosecuting this, this type, this particular case. do you?

Mr. Packel: I object. It is not a prosecution yet. That comes much later. He is asking for.

By Mr. Paul:

Q. Handling it. Let us put it that way, sir—

You don't—you don't even know who in the District Attorney's Office would handle this arrest by Captain Ferguson, do you?

A. Do I know who would prosecute it?

Q. Yes. You didn't know at that time, did you? Am I stating it correct now? You didn't know that at that time, did you?

A. Well, there—there was no prosecution involved at this time.

Q. It says, sir, if I am reading correctly and you read correctly, "A hearing will be held today."

You know, sir, that the District Attorney conducts the hearings; the police make the arrest and the District Attorney prosecutes during a hearing.

A. Preliminary hearing, yes.

Q. So it would indicate to you that there was an Assistant District Attorney involved, would it not?

A. Yes.

[56]

Q. All right; and you don't know and there is no indication, you have no record of—of who it was or was involved in the District Attorney's Office? You have no record to that effect?

A. No.

Q. And other than talking to Captain Clarence Ferguson how did you corroborate the fact that this—the man arrested was a main source of obscene literature in Philadelphia?

A. The source again principally, I am sure, was Captain Ferguson.

Q. So if I am correct what you seem to be telling me is Captain Ferguson was the source of all—all these facts that you reported over the air so far.

Mr. Packel: Well, now I don't think that is fair. He has indicated that it may well have been a District Attorney also. He doesn't know, as I understand it, so I think you are unfairly generalizing about his evidence.

By Mr. Paul:

Q. Well, sir, you don't know any other name but Captain Clarence Ferguson, is that correct, so far, and there is no way of your knowing any other name so far; is that correct?

A. So far as the stories indicate, you are correct; Ferguson seems to be the sole source.

• • •

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Mr. Paul: May I have this exhibit marked P-6 for identification?

(Newscast script dated 10-5-63, 1:30 A. M., marked Plaintiff's Exhibit No. 6 for identification.)

By Mr. Paul:

Q. Sir, would you read the reference in that script to this incident, what the script says about this incident?

A. P-6 you are talking about?

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Q. Yes, P-6, sir.

A. "A hearing is set for later this morning for George Rosenbloom of the 1800 block of Nester Avenue. A raid on Rosenbloom's home yesterday by Captain Clarence Ferguson's Special Investigation Squad turned up some 1000 allegedly obscene books."

Q. And that is how it came over the air; is that correct, sir?

A. Yes.

Q. Do you know how that information was corroborated?

A. This particular information was taken from the previous newscast, rewritten by a different newsman.

Q. So it was a rewrite; it wasn't further corroborated?

A. It was a rewrite of our original story.

Q. Yes. Who was the announcer on that script?

A. This is Nathaniel Wright.

Q. What was the—

A. The newsman on this newscast was Nathaniel Wright. The story was written by Gordon Thomas.

Q. How can you tell that, sir?

A. Well, each man who writes a newscast writes a particular story, dates it, times it, and initials it.

The man who does the newscast initials it, dates it, and times it. That is on the front sheet.

[64]

Q. Yes. Where does the person who writes the story initial, date, and time it; just above the story?

A. These three stories are written at the same time by that one man.

Q. And how can you tell from looking at that?

A. Looking at what?

Q. How can you tell that Nathaniel Wright wrote the stories?

A. I said it wasn't Nathaniel Wright who wrote it. Gordon Thomas wrote it.

Q. Gordon Thomas wrote this?

A. It has G.K. in this place. I am sure it is Gordon K. Thomas.

The initials on the front sheet are Nathaniel Wright.

Q. Fine. Now, the next broadcast after that news broadcast, what time was that?

A. What time was that news broadcast?

Q. This one was 1:30 A. M. The very next one—

A. The next one I have here in order is 6:00 A. M.

Q. On 10-5, 6:00 A. M., 1963; is that correct?

A. Right.

Q. Is there a reference in there to that incident?

A. No, this was the same story used at 6:00 A. M. that was written and used at 1:30 A. M.

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Q. It was rebroadcast; is that correct?
A. At 6:00 A. M.

Mr. Paul: May I have that marked, sir? I will hand this back.

(Newscast script dated 10-5, 6:00 A. M., marked Plaintiff's Exhibit No. 7 for identification.)

By The Court:

Q. P-7; this is 6:00 o'clock, 6:00 A. M.?
A. Yes, sir.

By Mr. Paul:

Q. Would you read that broadcast, sir?

Mr. Packel: Are we just going to have this again? He said it is a repeat of the last one, that was a repeat of the earlier one.

Mr. Paul: I think the jury is entitled to hear the same words. It may not be.

Mr. Packel: To save time, I raise no objection. This is not one of the items that was alleged, but to save time I make no point of it.

If he is going to waste time this way—

Mr. Paul: Believe me, sir, I am not wasting time.

The Court: All right, let's go. Go ahead, Mr. Rust.

[66]

A. "A hearing is set for later this morning for George Rosenbloom of the 1800 block of Nester Avenue. A raid on Rosenbloom's home yesterday by Captain Clarence

Ferguson's Special Investigation Squad turned up some 1000 allegedly obscene books."

Q. Thank you, sir. Would you—may I have the next broadcast?

May we just place that down with the others as we use them since it has been marked?

A. Yes, those two have been marked.

Q. May I have your next broadcast?

A. I don't see P-6 here.

Q. 6 is here.

A. The next is 8:00 A. M., 10-5-63.

Mr. Paul: May I have that script marked P-8, please?

(Newscast script dated 10-5, 8:00 A. M., marked Plaintiff's Exhibit No. 8 for identification.)

By Mr. Paul:

Q. Would you tell me who broadcast that script?

A. This was broadcast by John Paul Weber.

Q. And would you tell me in there what it says relating to this incident?

Read it to the jury, please.

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A. "A man described by police as being responsible for a main source of obscene literature in Philadelphia has a hearing before Magistrate Malone this morning. George Rosenbloom, of the 1800 block of Nester Street had been arrested in the citywide raids on newsstands last Tuesday, then was re-arrested yesterday after several thousand copies of allegedly smutty periodicals were confiscated from his apartment and a nearby barn."

Q. Sir, would you tell me how that news story was corroborated?

A. Now, what developed from the time beyond the initial information received from Captain Ferguson, what additional corroboration I can't tell you at this time. I just don't recall four years ago.

Q. Do you have any idea of where you got the facts from for this broadcast?

A. Primarily from Captain Ferguson, and I would imagine by—after several hours had passed these stories had been rewritten. I would presume that additional information had been gleaned from others.

Q. Well, could you tell me, sir, where you got the information, "—several thousand copies of allegedly smutty periodicals—"

Do you know where that information came from?

A. This I am sure came from Captain Ferguson. I feel

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certain that it did.

Q. Incidentally, you didn't write this script yourself, this news broadcast, did you?

A. No, this was written by John Paul Weber, the same man who had written the other.

Q. Do you know if anybody on your staff actually saw these magazines or the quantity of them?

A. So far as I know no man saw those magazines.

Q. And do you know what the words "smutty periodicals" mean?

A. I don't know what the writer intended here when he said "smutty periodicals."

The word "smutty" certainly has a negative connotation. I suppose it would be—you could place it in the same category of obscene material, periodicals.

Q. When you used the words "obscene literature" in this broadcast, or "smutty periodicals," do you know or did

ybody on your staff check with your attorney for any legal inition of what those things meant?

A. No.

Q. And did you or any member of your staff, in your npany, associated in the newsroom and with this broad-t, realize that George Rosenbloom was being charged with rime?

]

A. Did we realize he was being charged?

Q. Yes.

A. He was under arrest.

Q. As a matter of fact, the crime was possession of ob-ne literature, was it not?

A. To my recollection, yes.

Q. That was what the news broadcast was all about, s it not?

A. Yes.

Q. Incidentally, during this broadcast did anybody eck with the plaintiff in this case to find out the quantity magazines he had or the type of magazines he was dis-outing?

A. We would ofttimes attempt to reach them. In this e I would say I don't know.

However, it has been our experience in the past where ssible to do so on any kind of controversial issue, and of rse this would be a man under arrest; it would be usually policy to reach all parties involved, in keeping with our ling of fairness.

We have found that generally through experience that the most part it is most difficult to contact the suspect o has been charged, usually on advice by his counsel that not say a word.

]

Q. But you do make an attempt to either contact the defendant or his attorney on a controversial issue to see what they have to say, do you not?

A. Yes.

Q. In this case you did not; is that correct?

A. I don't recall.

Mr. Packel: He didn't say that.

Mr. Paul: I am asking the question.

The Witness: I don't recall.

By Mr. Paul:

Q. You don't recall?

A. I don't recall.

Q. Would you turn to your next news broadcast, sir? Tell me the time of that.

A. This is 10:00 A. M., 10-5-63.

By The Court:

Q. What time?

A. 10:00 A. M.

Mr. Packel: Your Honor, I think one thing should be made clear. When he says the next broadcast I think it should be made clear it is the next broadcast in which there was a reference to this incident, because there have been other broadcasts, but we were not asked to supply those.

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Mr. Paul: In the next broadcast which was in reference to this incident.

By Mr. Paul:

Q. Would you turn to the next broadcast which was in reference to this incident?

A. 10:00 A. M.

Q. 10:00—

A. A. M.

Q. —A. M. That is 10-5-63 at 10:00 A. M.; is that correct?

A. Correct.

Q. Now, would you turn to—

Mr. Packel: Again to save time, Your Honor, I call attention to the fact that this was not listed.

Mr. Paul: I am passing it, to save time.

Mr. Packel: I am sorry.

By Mr. Paul:

Q. Would you turn to the next time when there was a reference to this incident.

A. 11:00 A. M.

Q. Now, would you turn—that is still on 10-5?

A. No, that is 10-25.

Q. You just went from—the last date you had was when, sir?

A. 10-5.

Q. Now you skipped to 10-25?

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A. Yes. Perhaps these are out of order.

Mr. Packel: Your Honor, I have the explanation for that. I have the others. They were submitted subsequently.

Mr. Paul: Would you hand them to him?

Mr. Packel: That is why they are in a separate bunch.

(A group of news broadcasts were handed to the witness by Mr. Packel.)

By Mr. Paul:

Q. I am looking for the next time.
A. I have 10-21-63.
Q. What time?
A. 4:30 P. M.

By The Court:

Q. What time?
A. 4:30 P. M.
Q. Don't you have 10-21 at 6:30 A. M.?

Mr. Paul: This is 4:30. The next time after that then, sir—

The Court: Mr. Paul—

Mr. Paul: Yes, sir.

The Court: Do you mind if I get a question answered?

Mr. Paul: I am sorry, sir. I meant to aid

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the Court. I am sorry, sir.

By The Court:

Q. I think you told us, Mr. Rust, that the one was—the next one was 10-21 at 4:30 P. M.?

A. This is 4:30 P. M.
Q. Yes.
A. They might be out of order.
Q. Don't you have one for 6:30 A. M.?
A. On 10-21?
Q. Yes.

Mr. Packel: Your Honor, may I suggest that I might not have had these in order. That is why I think he should watch the—the others were in order but I don't know whether these were.

The Witness: Yes, these are—they go from the opposite extreme.

A. 6:30 was the first one, yes, sir.

By Mr. Paul:

Q. That is 10-21-63 at 6:30 A. M.; is that correct, sir?
A. Yes.

Mr. Paul: May I have that marked for identification?

(Newscast script dated 10-21-63, 6:30 A. M., marked Plaintiff's Exhibit No. 9 for identification.)

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By Mr. Paul:

Q. Now, sir, who was the announcer for that script on that broadcast?
A. David H. Crane.
Q. And would you read to the jury what it says in there about this incident?

A. I see no specific mention, reference to this particular incident in this.

Q. Are we talking about 10-21-63 at 6:30 A. M.?

A. Yes.

Mr. Packel: There is a reference.

By Mr. Paul:

Q. Would you look through it, sir?

A. Are you referring to the story that starts, "Federal District Judge Joseph S. Lord—"?

Q. Yes. Would you read that?

A. "Federal District Judge Joseph S. Lord, III, will hear argument today from two publishers and a distributor, all seeking an injunction against Philadelphia Police Commissioner Howard Leary, District Attorney James C. Crumlish, Jr., a local television station and a newspaper, ordering them to lay off the smut literature racket.

"The girly-book peddlers say the police

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crackdown and continued reference to their borderline literature as smut or filth is hurting their business. Judge Lord refused to issue a temporary injunction when he was first approached. Today he'll decide the issue. It will set a precedent and if the injunction is not granted it could signal an even more intense effort to rid the city of pornography."

Q. Now, sir, was your news staff or were you aware that it was George A. Rosenbloom, the plaintiff in this case, that was in court that morning seeking the injunction from city prosecution?

A. Was I aware?

Q. Yes, were you aware that this reference was to George A. Rosenbloom's case?

A. I would presume I knew, yes.

Q. And, sir, how was this information corroborated, verified, checked out; do you know?

A. Well, in this case as I recall we were—my newsmen had knowledge of the case in the District Court.

I am sure we would check with the District Attorney's office also and with the Police Department.

I don't know who the attorneys were representing Crumlish in the case, and Leary. It would be difficult for me to specifically state what additional corroboration we had.

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Q. Well, sir, in here it says Federal District Judge Joseph S. Lord. Would it surprise you to learn now that it was Judge John Lord of the Federal District Court and not Judge Joseph S. Lord?

A. As a newsman I regret to state that this is unfortunate, as to their Honors; this is an unfortunate mistake made fairly frequently by newsmen, I am afraid.

By The Court:

Q. Do you mean the confusion—

A. The confusion of the first name.

Q. Between the two of us?

A. Yes.

By Mr. Paul:

Q. Incidentally, sir,—

Mr. Packel: Could it be made clear to the jury—they may not know your first name.

Could it be made clear to the jury that this is your

name, but there is another judge in the District Court who is John Lord?

By Mr. Paul:

Q. That is true, is it not; you know that there is another judge?

A. Yes, this is just what I attempted to explain.

Q. Yes, sir. Now, sir, could you tell me where the statement

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was taken from, "ordering them to lay off the smut literature racket"?

Where did that come from?

Mr. Packel: I think the whole thing should be read. It is an injunction request, requesting that.

Mr. Paul: Yes. I would like to know where he got that from.

A. Well, this was filed at court. I am not sure who we got it from. We could have picked it up from the wire or through our routine calls to the individuals involved.

Q. Well—

A. There are any number of ways we could have picked it up. I can't recall exactly how this was picked up.

Q. Sir, isn't that a statement that your newsmen put in, "ordering them to lay off the smut literature racket"?

That is nothing that anybody told you; that is something that they typed in for broadcast?

A. This was written in by the newsman, yes.

Q. Pardon me?

A. This was written in by the newsman.

Q. And doesn't that make reference, sir, to the plaintiff as a racketeer? Wouldn't that lead you to believe that?

Mr. Packel: Your Honor, I object. It speaks for itself.

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The Court: Sustained.

By Mr. Paul:

Q. Sir, it says, it makes a reference to the "girly-book peddlers."

Do you know what a girly book is, that type of classification?

A. I don't know what the man intended here, the writer of this story intended in terms of "girly-book peddlers." I don't know.

Q. Well, there was a—there were more than several broadcasts and I assume that your news staff had been talking about what was going on and all of you were keeping up with the news?

Was there some discussion to you and amongst your other newsmen while you were present about these incidents of what was happening in the Federal Court and what the police were doing in the obscenity field?

A. On any kind of a story generally you find discussion among newsmen, yes.

Q. And you were the news director? One of your jobs was to know what was going on and what your other employees were doing?

A. As a news director there is a great deal I should know. I feel to a great extent I have a fairly good knowledge of

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what goes on in that shop.

Q. And you don't know what girly-book—

A. But at the same time it is difficult to—we have news 24 hours a day with two newscasts per hour, seven days a week, and I will review newscasts the following day, mostly, generally, and I would monitor as many newscasts as I possibly can. I would examine scripts during the time I was in the office.

I will discuss stories with newsmen and they will discuss stories with me, but all stories are not discussed with me. They are ofttimes discussed among the newsmen themselves.

Q. Well, in the case of this where a person is charged with crime and there is some indication as to whether it is dangerous or questionable for you to broadcast something over the air, isn't there a discussion about whether it should be broadcast or the manner in which it should be broadcast, or a policy concerning that type of broadcast?

A. No, that is not that great a problem, as it pertains to an arrest or a charge of arrest.

It is on the record, it is corroborated. We firm it up and we write it without embellishment, for the most part.

Q. Do you know where the phrase "girly-book peddler" came

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from?

A. This could have been a quote. However, it is not listed as a quote here.

Q. And I—yes?

A. I don't think it is an uncommon expression.

Q. Do you know what it means?

A. Girly-book?

Q. Yes.

A. I suppose it runs the gamut in terms of literature where it involves the female form.

Q. Would you classify nudist magazines as girly books?

Mr. Packel: I object, Your Honor.

The Court: Sustained.

By Mr. Paul:

Q. Do you know of any reference during these incidents of broadcasting where the defendant was related to as a distributor of nudist books and magazines?

A. Do I recall any story?

Q. Yes.

A. It may have been mentioned. I don't recall specifically, no.

Q. And when you made—the last statement was made, "It could signal an even more intense effort to rid the city of pornography."

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By that you were—that was the station's own words, was it not? That was their comment?

A. The reporter wrote that story. Now, whether he had received some indication—I don't recall whether or not there was a campaign against pornography going on at that time.

About that time, I think in the very newscast we examined, there was an arrest of interstate transportation of what was labelled pornography.

Q. That is a crime, is it not, sir?

A. What is that?

Q. Transporting pornography?

A. Yes, it is.

Q. And this makes reference to a crime: "—rid the city of pornography,"—which is to rid the city of crimes of pornography?

Mr. Packel: Again I object. The thing speaks for itself. He is rehashing it.

The Court: Sustained.

By Mr. Paul:

Q. Do you know where the statement in this broadcast came from where it says:

"—and continued reference to their borderline literature as smut or filth is hurting their business."

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Do you know where that came from, what source?

A. No, I can't tell you where that came from.

Q. Is it possible it was something that the script writer put in himself as a rehash of what had been told to him; not exactly a rehash but in his own words of what he heard?

A. Most newsmen attempt to think things out before they put it in print, without a question.

Q. They also attempt to summarize; is that correct, sir?

A. They attempt to tell you—to reduce the complex and make it comprehensible.

Q. So that it is newsworthy; is that correct?

A. We are not going to use something that is not necessarily newsworthy.

Q. And in radio broadcasting and in news reporting, script presentation of news events has to be presented in a certain fashion to attract attention; is that not correct?

A. What type fashion are you talking about?

Q. In a news fashion? For instance, if I told you, related a story that happened to you the other day and you thought it was newsworthy, yet you didn't like the form I presented it to you, you would rehash it so it would come out better over the air, and to make people interested in what you are saying; is that not so?

A. We attempt to create interest in the story.

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Q. Yes.

A. But I would make this reservation; we do not embellish for the sake of the story. We attempt to boil it down, boil it down to the fundamental facts.

Q. And make it pleasant to hear; by pleasant I mean in the presentation?

A. We attempt to make it so it is comprehensible without being too complex. We are dealing in an audio medium.

Q. Incidentally, what is the purpose of news broadcasts?

A. Information, to inform.

Q. Does your station make a profit from doing this?

Mr. Packel: Your Honor, I object.

A. This is not the purpose—

Mr. Paul: Wait.

Mr. Packel: Hold it. I object. I don't know where we are getting.

Obviously they are in business for profit. I don't see what his purpose is in going into the line of questioning.

Mr. Paul: I don't know if it is evidence or not unless he says it. I am sure it is common knowledge but I don't know whether it is part of the record unless he actually says it, sir.

The Court: All right.

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By Mr. Paul:

Q. In other words, you have one motive in distributing news, and the only motive in the radio station is to operate for a profit as everybody does in America?

That is a correct statement, is it not?

A. It is correct, with this reservation. I think you will find the responsible management of a radio station today—you will find that they are not intent upon making money from the news department. If they can sell the news programs, splendid, but the design is primarily as a public service, to inform, and you will find that most sales managers in radio stations, those who are duly concerned with the news department, you will find that they are—at least the previous sales manager we had felt this way, and we say the news department should hopefully be one of the best, and we should not be concerned with the profit involved.

Q. In other words, you are just merely telling the jury that your motive is making money ethically; is that correct?

A. No, I am not saying that at all.

Q. Not to make money at all?

A. I am not saying what you said a minute ago. I am saying that the management of WIP, the sales manager in the past, at the time of these stories, his thinking was that we should not first and foremost think in terms of making money from

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our news department; we should think first and foremost of running a good news department and if we can then—if we can sell the news programs, fine.

Q. If you don't run a good news department and there wasn't a good presentation over the air your station wouldn't be in business too long?

A. Chances are the news department wouldn't be in business.

Q. Incidentally, sir, during all these time periods we have mentioned was there any special campaign that your station had to help the police in ridding the city of borderline literature and pornography and obscenity?

Did you carry on any specific campaign as a public service to the community?

A. We had a campaign at one time. I don't recall when it was.

Q. Were these part of the campaign, these broadcasts relating to the plaintiff?

A. This I don't know.

Q. But your station does carry campaigns from time to time in the interest of the public, does it not?

A. Yes.

Q. Now, sir, may I direct your attention to the next broadcast?

Mr. Packel: You were referring to the 7:00 A. M.

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Mr. Paul: I think that is the next broadcast, if he will tell me.

A. 7:00 A. M., on 10-21.

Mr. Paul: May I have that marked P-10, please?

(Newscast script dated 10-21, 7:00 A. M., marked Plaintiff's Exhibit No. 10 for identification.)

By Mr. Paul:

Q. Now, sir, would you tell us who prepared this script and who broadcast it?

A. This was prepared by John Paul Weber and it was read by John Paul Weber.

Q. And, sir, would you tell us what the words relating to this incident were that were broadcast?

A. Repeat that, please?

Q. Would you read to the jury the words concerning this incident that were broadcast.

A. "Two publishers and a distributor argue in court today economic and financial hardship in police crackdown on alleged smut literature."

Q. Now, sir, that is a—relating to the previous broadcast concerning this incident, is it not, as a follow-up?

A. I would say so, yes.

Q. Or a rewrite, and the same corroboration for this would have been based upon the previous broadcast; is that correct?

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A. The corroboration—so far as a newsman is concerned it is a rewrite from a previous story, or stories.

Q. Now, would you please tell us where the information came from:

"Two publishers and a distributor argue in court today—"

Mr. Packel: That appeared in the previous one. He just told you it is a rewrite.

Mr. Paul: I am asking him.

Mr. Packel: It is in the previous one.

Mr. Paul: He can tell me that.

Mr. Packel: I will object, Your Honor, to the question.

The Court: Overruled.

By Mr. Paul:

Q. As your counsel says, did it appear in the previous one?

A. It says two publishers and a distributor in a previous newscast, yes.

Q. Would you be surprised to learn now, or have you learned now, that it was only one distributor involved before Judge John Lord?

The Court: Well, that 7:00 A. M. broadcast didn't refer to a Lord at all.

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Mr. Paul: Yes, sir. He said this was a rewrite of the previous broadcast, so the context of anybody hearing it would have been—who heard the previous broadcast would have been to put it in this context.

He didn't further corroborate it.

By Mr. Paul:

Q. This was merely taking a slice of a more detailed broadcast as sort of a spot news comment; is that correct?

This is sort of a spot news comment without going into greater elaboration as you did in the previous broadcast?

A. Yes, what you say is essentially correct.

Q. And the two publishers; I am trying to find out where you got that from.

A. I can't tell you where that came from. I can't tell you whether it is correct or incorrect.

Q. Certainly, sir, before coming into court and being involved in this case you have done some checking into the entire matter?

Do you know now if two distributors were involved in that injunction proceeding in the Federal Court?

Do you have any information on it now so that this could be corrected?

A. The information I have provided is all here and this is

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the first time I have perused this material for some time, and I can't actually tell you too much about this case.

Q. When is the last—

A. These stories at that time—it is four years ago.

Q. Prior to coming into court in this case when is the last time that you perused this material, approximately?

A. I don't know how long ago that was.

Q. Was it more than several months ago?

A. I would say yes.

Q. Was the last occurrence during the time where you gave these scripts to your attorney to transmit to me?

Was that the last time you checked into this material?

A. Yes.

Mr. Packel: To keep the record straight, Your Honor, these were in depositions that were answered.

Mr. Paul: Yes.

Mr. Packel: And he signed those depositions.

Mr. Paul: Yes, yes.

Mr. Packel: I am sorry, I don't mean depositions; I mean interrogatories, Your Honor.

By Mr. Paul:

Q. That has been marked P-10, has it not, this one you have just read, the spot news?

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A. Yes, it has.

Q. Would you lay that aside and go to your next newscast? I assume your next newscast was at 8:30 A. M. on the same day, if I am correct?

A. 8:30, correct.

Mr. Paul: May I have that marked for identification P-11?

(Newscast script dated 10-21-63, 8:30 A. M., marked Plaintiff's Exhibit No. 11 for identification.)

By Mr. Paul:

Q. Would you tell the jury who prepared and who broadcast that script?

A. This was prepared by David H. Crane and he read this newscast.

Q. Now, would you read that newscast to the jury, please?

The Court: Can't we agree, Mr. Paul, that that is exactly like, exactly like the one of 6:30 A. M. that has already been read?

Mr. Paul: If I may read it over just a moment, just to make sure.

By Mr. Paul:

Q. Sir, this broadcast that I have just asked you to read is exactly the same?

This 8:30 broadcast is exactly the same as

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the previous one you read, 6:30 A. M. broadcast; is that correct?

A. I am sure it is a carbon, yes.

Q. If I asked you the same questions that I asked—concerning this 8:30 A. M. broadcast as I asked you about the 6:30 A. M. broadcast, your answers would be the same, substantially?

You wouldn't vary anything, would you?

A. They would be substantially the same.

Q. Thank you, sir. And now, would you lay that aside and turn to your next broadcast?

By The Court:

Q. That also refers to the hearing before me; is that right?

A. Yes, sir.

By Mr. Paul:

Q. Would you turn to your next broadcast? I believe the next broadcast would be at 9:30 A. M.

A. 9:30.

Mr. Paul: May I have this broadcast marked—this script marked P-12?

(Newscast script dated 10-21-63, 9:30 A. M., marked Plaintiff's Exhibit No. 12 for identification.)

By Mr. Paul:

Q. Who prepared and read the script?

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A. David H. Crane.

Q. Now, would you read what was said concerning this incident?

A. "Smut distributors today seek an injunction against police raids in Philadelphia."

Q. Now, sir, is this also just a rewrite of the previous broadcast, without further corroboration?

A. This is a brief capsulation. It is a headline.

Q. But it comes from the previous broadcast, is that correct, without further corroboration?

A. The previous story, yes.

Q. Sir, I am curious to know why you said "smut distributors" in this spot whereas before you alleged, "two publishers and a distributor."

How did we get to "smut distributors"?

A. I didn't say it begins with this. It was written by David Crane.

Q. Your station in effect said it through David Crane.

A. I think smut was mentioned earlier.

Q. That is true, distributors.

A. And your question is what?

Q. My question is, how did you come to "smut distributors," that category, where previously you had talked about "two publishers and a distributor"?

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Now, we are talking about "smut distributors." I want to know what that story is about.

A. This story I am sure is referring to the previous two newscasts.

Q. Would you turn to your next—lay that aside, sir, and turn to your next broadcast where you made reference to this incident.

Mr. Packel: Are you referring to 10:30?

Mr. Paul: Yes.

A. The next one is 10:30.

Mr. Paul: May I have that script marked P-13 for identification?

(Newscasts script dated 10-21-63, 10:30 A. M., marked Plaintiff's Exhibit No. 13 for identification.)

By Mr. Paul:

Q. Would you tell us, sir, who prepared and announced that script?

A. This was prepared by William Paine.

Q. And what did he say in this script concerning this incident which was broadcast?

A. "Hearings are slated at this hour on a plea from two publishers and a magazine distributor for an injunction against Philadelphia Police, the

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District Attorney's office, and communications media. The complainants charge they're being hurt economically by the current crackdown on smut."

Q. Now, was this script independently corroborated or did this come from the previous story?

A. I would presume these came from previous scripts unless additional information had been gleaned.

Q. Would you lay that script aside, sir, and go to your next broadcast which appears—concerning this incident which appears to be 11:30 A. M. on 10-21?

A. 11:30.

Mr. Paul: May I have that script marked P-14 for identification?

(Newscast script dated 10-21-63, 11:30 A. M., marked Plaintiff's Exhibit No. 14 for identification.)

By Mr. Paul:

Q. Would you tell the jury, sir, who prepared and announced that script?

A. William Paine.

Q. Now, would you read it to the jury, what was said?

A. "Judge John Lord, Jr., has requested legal briefs to be filed Friday by defendants in the plea for an injunction against local police, the D. A.'s office and communications media lodged by publishers

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and distributors of alleged smut literature. All defendants moved for dismissal."

Mr. Fackel: Thank God we got the right Lord.

The Court: Don't celebrate too soon because a half hour later they go back to the old Lord.

Mr. Packel: —to the old Lord.

The Court: You shouldn't feel too badly about that because people often ask me if I am not confused with Judge John Lord, and the fact is I am confused with Adam.

By Mr. Paul:

Q. Sir, do you know if this story was independently corroborated or was this just a rewrite from a previous story?

A. It could have been both; I don't know which.

Mr. Packel: It certainly couldn't be a rewrite as to the name of the judge. That name hadn't appeared before.

By Mr. Paul:

Q. Sir, obviously from the stories these things were happening in the Federal Court. Do you have a man or reporter down in the Federal Court supplying you with information?

A. I don't know whether we had one or not at that time.

Q. Do you have one now in the Federal Court?

A. We don't have any man stationed anywhere permanently.

Q. How do you keep track of the stories coming out of the

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Federal Court?

A. We would call. We have our sources.

Q. The news reporters have a conference room here; is that not correct?

A. That is correct.

Q. They work for other media and they also aid your media too, independently?

A. If they did, that would be privileged information on my part.

Mr. Packel: I was just about—

Mr. Paul: Fine. I have no question about that.

By Mr. Paul:

Q. May we lay that script aside, sir, and go to the next news broadcast concerning this incident which I believe is at 12:00 o'clock noon, or noon.

A. I have the next one at noon.

Q. My copy is marked noon, 10-21-63. Is that what your copy is marked, what your original is marked?

A. That's right.

Q. By noon I assume is meant 12:00 o'clock?

A. Yes.

Mr. Paul: May I have that script marked for identification, P-15?

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(Newscast script dated 10-21-63, noon, marked Plaintiff's Exhibit No. 15 for identification.)

By Mr. Paul:

Q. Would you tell the jury who read and wrote this script?

A. This was read by me and it was written by John Paul Weber. This story was written by John Paul Weber.

Q. So I take it it is not unusual for the man that reads the broadcast not necessarily to have prepared the script for the broadcast; that is correct?

A. That is true. There are times when he might write the entire newscast. There are other times where he may have two or three carbon copies left by the previous newsmen that he may read or edit and read.

Q. That gives your news staff a degree of flexibility in writing the news and getting it out?

That is why you have eight men; is that correct?

You don't have a rigid system that the man that gets the news reports it; you just told me that.

My question is that that gives you a flexibility that you need to make the news department function smoothly?

A. With additional men, naturally you are more flexible than with fewer men, yes.

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Q. Would you read that broadcast, sir?

A. "Arguments before District Judge Joseph Lord, III, in a publishers-distributor plea of financial and economic hardship in the city's crackdown on alleged smut literature have been postponed until Friday at the request of defense attorneys. A TV station, the Evening Bulletin and the D.A.'s office are the target of two publishers (one publisher, scratch that, one publisher) and one distributing firm."

Q. How did the news broadcast go over from that script; "two publishers and one distributing firm" or "one publisher and one distributing firm"?

A. It is marked out here. The two is scratched out and the one is inserted, and the "s" is knocked off. The "publishers" is made singular by crossing the "s" out.

Q. So the news story obviously had been corrected from prior newscasts; is that correct?

A. So far as I can see here, yes.

Q. So it would indicate to you, would it not, sir, that there had been some additional checking?

Now the station had learned there was one publisher involved and not two?

A. This is possible.

Q. Yes, so if there was additional checking do you know of

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any reason why they went back to Joseph—Judge Joseph Lord and not John Lord?

A. Well, if we recall the previous newscast, it appears that John Paul Weber hung on Joseph Lord, III, and he came back to it at this noon rewrite and William Paine caught it as John Lord.

It is conceivable that one newsman may write a story and in his slot he might not see a possible corrected rewrite

by another newsman unless it is brought to his attention, since one man does not always see what the other has written.

It is fundamental, basic policy, where there is a change or correction of a story that all carbons are destroyed and the update or the new is brought into play, but there are times when one man does not get the word.

Q. Then that would indicate there is some lack of communication between all eight of you, would it not?

A. Oh, no doubt there is.

Q. And that further indicates to me, please tell me if I am correct, that you are working against a time deadline to get the news and get it out over a certain time on the radio?

You are meeting time deadlines; is that not correct?

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A. Yes, that is correct.

Q. You have deadlines? You are always pressed to get the news on; is that correct?

A. Yes, we live and work like that.

Q. Does that explain these little mistakes that occur, these inadvertencies, or is there some other reason?

A. I wouldn't say it is necessarily the time element. Time plays an important role in it.

It might well have been that the individual knew about this but was very much involved in something else and the information wasn't absorbed by him.

There are many things that happen in the shop that does tie an individual up and true, inadvertent errors would be made, but hopefully corrected soon. The world of journalism is a world of deadlines.

Q. Thank you, sir. Would you lay that script aside, sir, and go to the next script which is in reference to these broadcasts, which I assume—what I have is 2:00 P. M. on 10-21-63.

A. 2:00 P. M., yes.
Q. Do you have that, sir?
A. 2:00 P. M.

Mr. Paul: May I have that script marked P-16 for identification?

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(Newscast script dated 10-21-63, 2:00 P. M., marked Plaintiff's Exhibit No. 16 for identification.)

By Mr. Paul:

Q. Would you tell us who prepared this script?
A. William Paine.
Q. Incidentally, you were there that day. What happened to you in between?

You announced that last script and Paine took over. Is there any reason for that?

A. No, I had no regular schedule. I would attempt to do the noon news, to keep my hand in on the air. I kept myself off the air because I was too busy doing other things.
Q. Could you tell us what was broadcast on that script?
A. The broadcast by William Paine?
Q. Yes.

Mr. Packel: His question was what was broadcast.

By Mr. Paul:

Q. Yes, that is what I said, what was broadcast. Would you read it to the jury?

A. "Further arguments are slated before Federal Judge John Lord, Jr., on Friday in the petition of two publishers and a distributor who are asking an injunction against further raids by police and the D. A.'s office on smut publications. The complainants charge

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they are being hurt financially. Judge Lord gave the defendants until Friday to file legal briefs in their request that the charges be dismissed."

Q. Now, sir, that broadcast is back to the inaccuracies, obviously, am I correct, back to the accurate thing, Judge John Lord, back to the inaccurate thing of two publishers? Am I correct?

A. There is inaccuracy in this newscast from the corrected one at 12:00 o'clock noon, yes.

Q. Could you turn to the next broadcast concerning this incident which I think is 4:30 on that same day.

A. 4:30, yes.

Q. Do you have that, sir?

A. Pardon me?

Q. Do you have that, sir?

A. Yes.

Mr. Paul: May I have that marked P-17 for identification?

(Newscast script dated 10-21-63, 4:30, marked Plaintiff's Exhibit No. 17 for identification.)

By Mr Paul:

Q. Now, sir, would you tell us who prepared and broadcast that script?

A. It was read by Nathaniel Wright and initialled

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V. A. P. I don't recall those at the moment.

Q. Would you read what was broadcast?

A. "In Federal Court later today two publishers and a distributor of alleged smut literature will go before Judge Lord—"

Q. Is that what it says?

A. It says, "—go before Judge Gold."

"—claiming they are suffering economic and financial hardship because of a recent crackdown on such material."

Q. Would it surprise you to learn, sir, that Judge Gold is in our local courts and not in the Federal Court?

A. I am well aware of that.

Mr. Packel: He hasn't been promoted yet.

By Mr. Paul:

Q. There is also another inaccuracy in referring to two publishers, and now we know there is only one publisher; isn't that correct?

Mr. Packel: Your Honor, let's get squared away. There is a reference to the two publishers. He said he didn't know whether it was two or one.

He said it was corrected one time to say one but it hasn't been established yet whether it is two or one.

By Mr. Paul:

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Q. Do you know, sir, whether it was two or one?

A. No, I don't.

Q. Do you know from any of your perusal through these broadcasts, checking into this matter, who the publisher was or publishers were; do you know that?

A. No, I don't.

Q. Did you consider it important as to who the publishers were, or did your office consider it important as to who the publishers were?

A. I am sure we did.

Q. Well, what did you do about finding out who they were?

A. I don't know whether they are mentioned in a later broadcast or not, or whether they were mentioned.

Q. Why would you think that they were important?

Mr. Packel: He did not say that he thought that it was important.

By Mr. Paul:

Q. Did I misunderstand you? Did you say that they weren't important, publishers?

A. The mention of the fact, two publishers and a distributor—

Q. Yes.

A. The mention of them indicates importance, but at the same time in the stories we are talking about here, in the case before the Federal Court, we mentioned—there is no mention of the names of the distributor or the publishers in this

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case.

It is a matter of brevity in attempting to lay out to the listener the essence of the story.

Q. Actually, sir, your broadcasts indicated that George A. Rosenbloom was the distributor of smut, as you say, and was arrested and then you indicated there in following broadcasts in the same period of time he went before the Court the next day?

Don't you pick that up from these stories? Aren't you interested in that?

Mr. Packel: I object, Your Honor, because he is not correctly describing the witness' testimony.

As to this latter series of stories there was no mention of Rosenbloom's name.

The Court: That is true.

Mr. Paul: That is true. I am asking him didn't his office know, wasn't the inference made and intended to be made that this person was arrested and was now in the Federal Court seeking to stop the District Attorney's office and the various news media from doing what they were doing?

A. There was a difference of some 16 days between the time of the last story that used reference to Mr. Rosenbloom and the time this case was brought in Federal Court.

Q. Weren't these stories important, of what was going on in the city with this distributor?

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Isn't that why the police were doing this to this man?

Wasn't that what all these broadcasts were about, what the city was doing to this man?

Mr. Packel: Which broadcasts; the later ones?

By Mr. Paul:

Q. All the broadcasts? That is why the whole thing is important. Otherwise why was it important for the community to know, so you broadcast these bits of information?

You didn't think these were a series of unrelated events, did you, that had no meaning to the public?

Mr. Packel: You have asked a series of questions. May I ask that you rephrase it, or ask just one question?

The Court: I disagree with you, Mr. Packel. He has made a series of statements.

I have yet to hear a question.

By Mr. Paul:

Q. I want to know why you mentioned these whole series?

I asked you didn't you think they are important, they are connected?

Didn't you think they were important to the public; that is why all the series were mentioned?

The Court: Wouldn't it be nice if you asked

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one question and stopped, and let the witness answer it?

Mr. Paul: Yes, sir.

By Mr. Paul:

Q. The reason that these series were broadcast was because it was important to the public to know; right?

A. Yes.

Q. And it was important to the public in the series fashion over this period of time because they were related; is that not correct?

A. Which series are you talking about?

Q. The whole month period?

A. I would say the stories dating between the 1st and the 5th were related.

We had a different story essentially altogether from the 21st on.

Q. Weren't you reporting as to what was going on in the city during this time as it concerns obscenity and pornography?

Isn't that what you were doing? Weren't you doing that?

A. The first five days as I recall we were talking about the arrest of Mr. Rosenbloom.

Q. What were you talking about here?

A. We were talking about the attempt by the distributor and two publishers to have an injunction levelled against further

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arrests by police.

Q. If it was important for you to tell at the beginning of the month why Mr. Rosenbloom was arrested, and mentioned his name, why wasn't it important to you at the end of the month to mention that he was now in the Federal Court?

Mr. Packel: Your Honor, I object. There is no reference in here to him being in Federal Court and the question—I also object on the ground it is argumentative.

He has gone over this several times.

The Court: Sustained.

By Mr. Paul:

Q. Well, why didn't you mention the names of the two publishers and the distributor during this last broadcast that you mentioned?

A. I would imagine it is primarily a matter of brevity. You had more than—that more than anything else, I would think.

Q. Isn't it a fact, sir, that the names were unimportant but the incident was more important?

A. I would concur that the—in this case that the effort by the distributor and the publishers—the injunction story

was, I think—yes, would outweigh the names of the individuals involved.

Q. Would you please tell the jury in the previous broadcasts

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where the plaintiff's name was mentioned why the incident and the name was important, and not just the incident?

A. Well, we have an arrest. We have a situation here where we have a raid and an arrest results.

It is important to include the who and where and what happened, and this is followed out in any story that we carry.

To single the individual out is not our game at all. This is not our intent. It is our attempt to inform, to make known what occurred.

Q. But you did single the individual out, didn't you?

A. I did not single the individual out.

Mr. Packel: I object. This is going on endlessly.

The Court: That is argument, Mr. Paul. You have it in the record.

Mr. Paul: Yes, sir.

By Mr. Paul:

Q. You knew during the prior events, during the arrests, that there were some 21 people arrested, is that correct, from your stories?

A. There were 21 people arrested?

Q. Yes.

Mr. Packel: Where is that reference? I don't mean to say it is not so, but I want to know where the

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reference is.

Mr. Paul: Let me strike that question and rephrase it.

By Mr. Paul:

Q. Does your staff or did your staff know the background of this entire arrest?

A. What do you mean by the background?

Q. Did they know how George Rosenbloom was arrested, under what circumstances?

A. After 24 hours I would imagine that all—we would be fairly familiar with the story, yes.

We have days off. It is possible a man could have been off in fact.

Q. So if they were corroborating the story by Captain Ferguson, the man indicated who made the arrest, or helped make the arrest, that they got the whole story from him and just printed what they wanted from it; is that correct?

A. They include the pertinent facts, hopefully, to write a story.

Q. If they learned from Captain Ferguson that 21 other men were arrested would they—wouldn't that be pertinent?

Mr. Packel: I object unless he makes clear arrested for what.

Mr. Paul: The same thing.

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Mr. Packel: For distributing or for selling, possession.

Mr. Paul: Selling and distributing are the same thing, selling and distributing.

A. If they were arrested, 21 other men—

Q. Yes.

A. And it came to our attention, certainly I am sure we would include it.

Q. Would you mention their names also if they came to your attention?

A. It is doubtful that we would run down 21 names.

Q. Why out of 21 people—

The Court: There is no evidence of 21 people.

Mr. Paul: Yes, sir.

By Mr. Paul:

Q. We will go on to the next. We will put P-17 aside and go to the next at 5:30 P.M., I believe?

A. Right.

Q. That is on 10-21-63; is that correct?

A. That is correct.

Q. Would you tell us who was the announcer and the script writer?

A. The newsman reading was William Paine. The writer was William Paine.

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Q. And would you read to the jury what was said at that time?

A. "A three-judge panel is finishing up a pre-sentence investigation—"

That is the wrong story.

"Attorneys for a TV station, the Evening Bulletin, Police Commissioner Leary, and the D.A.'s office have been given until Friday to prepare legal briefs outlining their request for dismissal of a smut seeking—"

By Mr. Packel:

Q. Does it say "smut" or "suit"?

A. "—dismissal of a suit seeking to halt the recent series of raids on smut literature—"

Mr. Packel: Counsel agrees—

The Witness:

"—and pornographic material. The petition for an injunction against the raids was instituted by two publishers and a magazine distributor."

Mr. Packel: If Your Honor please, in the fourth line counsel agree that the word "smut" that appears there is really "suit," and should be corrected.

By Mr. Paul:

Q. Would you lay that document aside, sir, and go—turn

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to the next news broadcast concerning this incident which would be 8:30 A. M. the following—on 10-25-63 if I am correct.

A. What time do you have on the 25th?

Q. 10-25-63 at 8:30 A. M.

Mr. Packel: No.

By Mr. Paul:

Q. Is there one for that time?

A. I don't have a 10-25 at 8:30.

By Mr. Packel:

Q. There is one.

A. There is?

Mr. Paul: Perhaps counsel can show him.

By Mr. Paul:

Q. What is your next broadcast? What do you have there?

A. I have 11:00 A. M., noon and 4:30 on the—no, I have 11:00 A. M. and 4:30 P. M. on the 25th.

Q. Do you have a script marked 10-25-63? What is your first script marked 10-25-63?

A. 11:00 A.M.

Q. Would you look through that script? Perhaps there is some reference to an 8:30 A. M. broadcast.

A. Which script, 11:00 A. M.?

Q. The script marked 10-25-63.

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Mr. Packel: May I look at them and I may be able to find what we are looking for.

Mr. Paul: Yes.

(Counsel confer off the record.)

By Mr. Paul:

Q. In the script that you have marked 10-25-63, 11:00 A. M., if you will look at the third page, at the top of the page there is—it is marked 8:30 A. M. rewrite, 10/25, is it not?

A. Yes.

Mr. Paul: May I have that marked, and then I will ask you about it.

Mr. Packel: Which script is this again?

Mr. Paul: The 11:00 A. M. script.

Mr. Packel: 11:00 A. M.

The Court: You never found the 8:30 one?

Mr. Paul: It is in here, sir.

(Newscast script dated 10-25-63, 11:00 A. M., marked Plaintiff's Exhibit No. 19 for identification.)

By Mr. Paul:

Q. Will you tell me who the announcer was and would you read to the jury what was said on that?

A. The announcer was William Paine. The story was written by David Crane.

"The Philadelphia District Attorney, Police

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Commissioner Howard Leary, a TV station and a newspaper must file papers with Federal Court today explaining why they should not be enjoined from further raids on local newstands in a hunt for pornographic literature. Two publishers and a distributor claim the raids are hurting their business."

Q. Do you know if that story is accurate?

A. I can see it is most inaccurate. In a story such as this a man has to rewrite as he reads.

By The Court:

Q. I didn't understand.

A. In a story such as this it is quite obvious when one reads it what the error is. He may have gone over that and corrected it while on the air.

Q. What was the inaccuracy in that?

A. "—a TV station and a newspaper must file papers with Federal Court today explaining why they should not be enjoined from further raids—"

The Court: Oh, all right. All right, we will take a short recess.

(Short recess.)

By Mr. Paul:

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Q. Now, sir, you just read the 8:30 A. M. broadcast and from a script marked 11:00 A. M. which we had marked P-19.

Would you lay that script aside, sir?

Is there any other additional references in that script, may I ask, before you lay it aside?

A. No, not that I can see.

Q. Thank you. Lay that aside, sir, and turn to the next broadcast which would be 10-25-63 at 4:30 P. M.

A. Yes, I have it.

Mr. Paul: May I have it marked P-20 for identification, please?

(Newscast script dated 10-25-63, 4:30 P. M., marked Plaintiff's Exhibit No. 20 for identification.)

By Mr. Paul:

Q. Would you tell us who prepared and announced that script?

A. This was read by William Paine and written by William Paine.

Q. And would you say—would you repeat to the jury what was read on the air?

A. "Federal Judge Joseph Lord, Jr., has taken under advisement a series of legal briefs requesting dismissal of a petition for an injunction against further smut raids by the D. A.'s office and the Police Department. The petition filed by two publishers and

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a distributor of magazines says the raids have hurt business."

Q. Thank you, sir.

Do you know if that is accurate?

A. We have the wrong judge again.

The Court: You have partly the right judge.

The Witness: Yes, sir.

Mr. Packel: Which part?

The Court: The Junior. He is John W. Lord, Jr., and I am Joseph S. Lord, III, so you got us half and half this time.

The Witness: Now, this story so far as I can see, was not updated.

By Mr. Paul:

Q. It was what, sir?

A. It was not updated, if the 11:00 A. M., was correct.

Q. Do you mean it is a rewrite and not further verified; is that correct?

Mr. Packel: It speaks for itself, Your Honor. It refers to "has taken under advisement."

I don't think there is any reference to this before but in any event I don't see that there is any need for further inquiry since it does speak for itself.

By Mr. Paul:

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Q. Would you turn to the last script, sir, which was indicated to me as 11-1-63 at 12:00 noon. Do you have that?

A. Yes, I have it.

Q. Would you tell me—

Mr. Paul: May I have that marked P-21?

(Newscast script dated 11-1, 12:00 noon, marked Plaintiff's Exhibit No. 21 for identification.)

Q. Would you tell us who prepared and announced that script?

A. This is written by John Paul Weber and read by John Paul Weber.

Q. Now, would you read what it says?

A. "U. S. District Judge John Lord told WIP news just before air-time that it may be another week before he will be able to render a decision as to whether he has jurisdiction in the case of two publishers and a distributor who wish to restrain the D.A.'s office, the Police Chief, a TV station and the Bulletin for either making alleged raids of their publications, considered smut and immoral literature by the defendants named, or publicizing that they are in that category. Judge Lord then will be in a position to rule on injunction proceedings asked by the publishers and distributor claiming the loss of business

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in their operations."

Q. Is that accurate, sir, that broadcast?

A. I would say that is essentially accurate except the—

Q. Well, obviously—

A. —so far as I know.

Q. The Police Chief, a TV station, and the Bulletin—

A. It means Police Commissioner. This says Chief.

Q. "—for either making alleged raids of their publications, considered smut and immoral literature by the defendants named, or publicizing that they are in that category."

That would be accurate, would it not? That is accurate?

A. It appears so. Will you read that again? What specifically? I don't where you started.

Q. Strike the question. It speaks for itself. I am not questioning that accuracy. However, it would appear that this story was corroborated by talking to the judge himself, Judge John Lord?

A. Yes.

Q. Right, and I would assume, if you will verify it, that this was done by telephone and not in person; is that correct?

A. Yes.

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Q. Did anybody from your office staff go down and actually check the Federal Court records to see what was being asked and what was going on?

A. This I don't know.

Q. Now, sir, will you tell this jury the worth of Metromedia, Inc.?

Mr. Packel: Objection, Your Honor.

Mr. Paul: Would Your Honor hear argument? I will cite a case at side bar.

(Discussion off the record at side bar.)

(The following at side bar:)

The Court: As to the last question that was asked and to which objection was interposed, it is the view of the Court that at this point evidence of the worth of the defendant is immaterial. This would be material only on the question of punitive damages after the plaintiff has made out a case of liability. Until that time such evidence is immaterial.

For that reason I am sustaining the objection at this time with the understanding that after the plaintiff has put on all of his evidence of liability he may then offer the evidence of the worth of the defendant at that point.

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I anticipate that the defendant will object if the defendant feels that a case of liability has not been made out.

It will then be incumbent upon me to determine whether the plaintiff has made a case for submission to the jury. If he has, I will permit the plaintiff of course to present the proof which he now proposes to present at this time. If he has not, the matter will be academic.

(End of discussion at side bar.)

Mr. Paul: Sir, subject to further questioning as in accordance with Your Honor's ruling I will defer to cross-examination.

Mr. Packell: No questions, Your Honor.

Mr. Paul: Thank you, sir.

The Court: That's all, Mr. Rust.

(Witness excused.)

Mr. Paul: May I call George Rosenbloom, the plaintiff, to the stand, sir.

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GEORGE ALBERT ROSENBLOOM, sworn.

DIRECT EXAMINATION

By Mr. Paul:

Q. As you said, your full name is George A. Rosenbloom, is it not?

A. Yes, sir.

Q. And how old are you?

A. I am 44 years old.

Q. And where do you live?

A. I live at 1852 Nester Street, Apartment B, Philadelphia.

Q. And would you tell us on about October 1, 1963 what was your business?

A. I was in the wholesale magazine distributing business and I distributed magazines for a company known as Outdoor American Corporation.

Q. Now, when did you start that business?

A. We started in business around May 1, 1963.

Q. And prior to starting this business had you any experience in the distribution of periodicals?

A. Yes.

Q. Would you tell the jury what experience you had prior to starting this business?

A. I worked for the United News Company for approximately six years.

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Q. Who are they?

A. United News is the largest distributors of books and magazines in the United States. They are located here in Philadelphia.

Q. And what area do they cover?

A. They cover an area from Downingtown on the west to Egg Harbor in New Jersey in the east; Burlington to the north in New Jersey, Doylestown in the north in Pennsylvania.

They go south as far as Salem and Bridgeton, Vineland, Millville, in New Jersey, and in Pennsylvania they go as far south as parts of Delaware County, Media.

Q. What did you do for them, the United News people?

Mr. Packel: Your Honor, I object. I can see that it is hard for Your Honor to tell whether it is objectionable or not, but obviously his former employment is of no significance in this caes.

Mr. Paul: I have to establish that he was knowledgeable in this field and that he was an expert in this type of business prior to entering it himself, so he knew what he was selling and what was going on at the time.

The Court: I will hear it.

By Mr. Paul:

Q. Would you tell the jury what your job was with United News?

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A. For about four years of the time that I worked for United News I was a paperback book salesmn. Around 1957 the company had asked me, had asked every other man working as a promotion or distributor, distribution man—

Mr. Packel: If Your Honor please, I will object. He is giving hearsay, saying the company asked him.

The Court: Sustained.

By Mr. Paul:

Q. You said you sold paperback books for them?

A. Yes.

Q. In what area did you sell paperback books for them?

A. In their entire territory.

Q. Approximately how many accounts did you call on?

A. I called on every Sun Ray store in that territory plus I used to service the Philadelphia International Airport.

I serviced every railroad station in the city and every bus terminal in the city. I also would service the major book accounts in the outlying areas.

Q. Now, would you tell the jury how you came to go into this business on May 1, 1963, this business of your own which you mentioned?

A. About—

Mr. Packel: Your Honor, what is the date?

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May 1, 1963?

I thought he testified he went into it October 1, '63.

The Court: No, May 1, '63.

Mr. Packel: Oh, May 1, '63. All right.

A. (Continuing) In the summer of 1962 I was contacted by Mr. Norval Packwood, who is a vice-president of the Outdoor American Company and the Eastern Director of the company's operations.

Q. What is the Outdoor American Company?

A. The Outdoor American Company is a company that publishes nudist magazines.

Q. And as a result of this contact with Mr. Packwood what did you do?

A. Before I decided to enter into any kind of a business relationship with the Outdoor American Company I made it my business to check to find out whether or not certain information that he had given to me was accurate.

Mr. Packwood had told me—

Q. Don't tell us what he told you, but what were you checking out? What did you do yourself?

A. I was checking out with my attorney the accuracy of whether or not Mr. Mervin Mounce was the principal owner of the Outdoor American Company; whether or not he was known

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throughout the company as a legitimate, registered nudist; whether or not he actually owned a nudist camp in Spokane, Washington; whether or not they had a right to—a legal

right to be in business; and whether or not Mr. Packwood, who was my original contact, actually owned a nudist camp in Mays Landing, New Jersey, and that he was actually a secretary in the Mays Landing Chamber of Commerce; and to find out whether or not these magazines that they printed and published were legal.

Q. Now, your business did sell—what did you distribute in your business; would you tell the jury?

A. The only magazines or publications that I ever distributed were books or magazines that were published by the Outdoor American Company.

Q. Now, what was your intention in forming this business?

A. My intention was to build a company that was a wholesale distributor of books and magazines. The potential in this area, the area that they gave me, was tremendous.

Q. What area did they give you? You are speaking about Outdoor American, are you not?

A. Yes.

Q. What area did they give you?

A. The territory they gave to me was from Atlantic City on the east to Harrisburg on the west; from Wilmington, Delaware,

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on the south to Trenton, New Jersey, on the north.

Q. And you had previous experience in this area, did you not?

A. Yes.

Q. Now, did you take on any other lines? Did you try to take on any other lines; let's put it that way.

A. No.

Q. When you started business how many accounts were you servicing?

A. Well, the day I started in business I didn't have any but I built it up to a point where on October 1 I had 60 accounts.

Q. How did you get your accounts?

By Mr. Packel:

Q. What was the answer; how many accounts?

A. 60.

Q. That was on October 1 of what year?

A. 1963.

By Mr. Paul:

Q. How did you get these accounts?

A. I got them from—by personal solicitation.

Q. Had you known these people before?

A. Many of them, yes.

Q. Had they known you before?

A. Yes.

Q. How?

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A. By doing business with me while I worked for United News.

Q. Now, on October 1, 1963 you were arrested, were you not?

A. Yes.

Q. For selling these magazines, were you not, or distributing these magazines?

A. Yes.

Q. And selling them?

A. Yes.

Q. Prior to that time were you ever arrested for selling and distributing magazines?

A. Never.

Q. Now, would you tell the jury the circumstances of that arrest?

A. It was on a Tuesday morning and approximately 11:00 o'clock I was making a delivery at a newsstand located on the southeast corner of 15th and Market.

I made a delivery. I laid my merchandise on the stand, the news operator signed the slip that he received it, and I felt someone grab my arm and say, "You are under arrest."

Q. And then what happened to you?

A. Well, we stood on that corner for about half an hour and the—

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Q. Let me put it this way. You were taken to the station house, were you not?

A. Yes.

Q. And was there anybody else arrested with you?

A. Yes.

Q. How many other people?

A. 21 other men.

Q. And what type of people were they? Who were they, not by name, but who were they?

A. They were newsstand operators with locations in various parts of the city.

Q. They are the ones that are on the corner newsstands?

A. Yes.

Q. And what—

A. Excuse me. There were two store owners involved in that too. One man had a store at 5th and Allegheny in Philadelphia and the other man had a store at Broad and Girard.

Q. Did you supply all these people?

A. No.

Q. Did you supply some of them?

A. Yes.

Q. How many of these people did you supply?

A. Of the 21 men arrested I supplied 15 of them.

Q. But you were also servicing 60 all together?

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A. Yes.

Q. Now, there were other firms that were supplying these magazines, these newsdealers, were there not?

A. Yes.

Q. Who were your competitors at that time?

A. One of them was United News. One of them was the Dale Book Company. One of them was Vision Distributors.

Q. During that time were any of these other distributors arrested?

A. No. Excuse me, excuse me. The owner of the Dale Book Company was arrested on October 4.

Q. During this time?

A. Yes.

Q. You were re-arrested later on?

A. Yes.

Q. There was another arrest later on?

A. Yes.

Q. That was when?

A. October 4.

Q. In size what was your relation to these other distributors?

A. I probably was one of the smallest distributors in the country.

Q. Did they distribute the same material that you did?

A. They distributed the same type, yes.

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Q. By "type," what do you mean?

A. Well, there was a classification known as nudist-type magazines and they were published by a various number of companies or people and they fell under the classification of nudist magazine, nudist-type magazines.

Q. Is there a distinction between girly-book magazine?

A. Oh, yes.

Q. What is the difference between girlie-book—is that commonly known in the trade?

A. Yes.

Q. What is the difference between girlie-books and nudist magazines?

A. The basic difference between a girlie-type magazine and a nudist magazine is a girlie-type magazine will show pictures of girls or women with parts of clothing that are used to attract or to perhaps arouse, to entice men to look at these pictures.

By Mr. Packel:

Q. Entice men—what?

A. To look at them.

By Mr. Paul:

Q. In other words, they are suggestive poses, are they not?

A. Yes.

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Q. How does that differ from a nudist magazine?

A. A legitimate nudist magazine shows people engaging in activities like volley ball, playing baseball or swimming or enjoying the benefits of the sun, showing family groups living in a nudist type atmosphere.

Q. Why do you say legitimate nudist magazine?

A. There is a big difference between the legitimate nudist magazine and nudist-type magazines.

Q. What is—for instance, what is an illegitimate nudist magazine, or a nudist-type magazine?

A. A legitimate nudist magazine tries to honestly portray the life in a nudist camp, will try to take pictures of people in normal life situations.

Many times in taking pictures of people in normal movement if the photographer isn't very careful an innocent act of standing up or sitting down or just moving, if a photographer isn't very careful, he can take a pose that innocently could be very, very suggestive.

Now, a legitimate publisher will try when they are taking these pictures not to get these type of poses and if they do will discard them and destroy them, because this is not what they are trying to show.

On the other hand there are publishers who will deliberately try to get these type poses because they

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will sell a lot more magazines.

Q. Well, how about the written material in the magazines; is there a difference?

A. Yes, a legitimate magazine that is supposed to be about the nudist way of life will have a large portion of the magazines devoted to articles about why a person should join the nudist movement, the benefits that they should get from it.

Q. How about the illegitimate ones?

A. I have seen some magazines that never had a word of copy in it other than a lot of pictures.

Q. Did you distribute any of those types?

A. Never.

Q. Why didn't you?

A. Because the publisher of the magazines that I distributed was trying to increase membership in a nudist movement and this is why he was publishing these magazines.

Q. Well, were you interested in the nudist movement yourself?

A. I was never a nudist, no.

Q. Well, what were you in business for?

A. I was in business to make a profit, to make a company grow.

Q. What kind of profit did you make?

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Mr. Packel: I will object, Your Honor.

The Court: Overruled.

A. Well, I was—the first couple of months we—as we were growing I would say I made as much as I would have made at any other job that I would work at, had worked at.

Q. Let me ask you this question so we understand. You went into business with the thought of making a certain amount of money?

A. Yes.

Q. In the area; is that correct?

A. Yes.

Q. You knew the area; is that correct?

A. Yes.

Q. What were your expectations from this one company?

Mr. Packel: I again object, Your Honor. I thought Your Honor had taken a position on this.

The Court: No, I will sustain the objection as to the form of that question. I don't think—I am not going to have him recall this witness.

Mr. Packel: All right, are you going to allow him to go into this so-called loss of profits?

The Court: Yes.

Mr. Packel: At this stage, Your Honor?

The Court: Yes.

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By Mr. Paul:

Q. My question was, in other words, you talked to the publisher, you started business, you had projections?

A. Yes.

Q. I would like to know what projections you had. What did you do?

A. We had projected for the Philadelphia area itself, the immediate city itself—

Mr. Packel: I am sorry to interrupt. I will object, Your Honor, to any projections.

The Court: Yes, sustained.

By Mr. Paul:

Q. How many accounts were there in the City of Philadelphia?

A. In the City of Philadelphia there were probably about 75 to 100 accounts that I could have opened up with my magazines.

By The Court:

Q. How many?

A. Between 75 and 100, sir.

By Mr. Paul:

Q. And on October 1, 1963 as you testified you had 60 of those accounts?

A. Yes.

Q. And you kept records of—

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A. Yes.

Q. —who you sold to and what they paid; is that not correct?

A. Correct.

Q. And you have those records with you in court today, do you not?

A. Yes.

Q. Incidentally, after you were arrested a second time what happened to your case in court?

Mr. Packel: I object, Your Honor.

By Mr. Paul:

Q. What happened to you?

The Court: Which case in court?

Mr. Paul. He was arrested twice. His cases went to court.

It is only one case, really, because they heard both of them. I want to know what happened to them.

The Court: What is the basis of your objection, Mr. Packel?

Mr. Packel: It has no relevancy to the question of the alleged defamation.

What eventually happened, if Your Honor will keep in mind, what the result is in the criminal trial has nothing whatever to do with the issues of whether the state-

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ments made by the defendant are defamatory.

Mr. Paul: Sir, may I—it would go to show their due diligence to investigate information, in reporting the news, to see what this man had, to see what he was selling, if they were legal or illegal. It has great bearing on this case on what they could have ascertained.

Mr. Packel: Your Honor, we are talking about a period from October 1 to a period of roughly—I think the last testimony was somewhere around November 1.

The Court: That's right.

Mr. Packel: Now, if something transpired in that period—

The Court: Yes.

Mr. Packel: —and was not reported, I have no objection, but if he will establish that something transpired in that period I will withdraw my objection.

The Court: All right.

Mr. Paul: The whole argument is that something did transpire which they say is illegal. I am attempting to show nothing he has done was illegal or wrong.

Mr. Packel: We said he had been arrested for certain things. We didn't say anything he did was illegal.

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Mr. Paul: Sir, I believe my last question to the witness was what had happened to him as a result of these arrests in court, and there was an objection.

Mr. Packel objected on the ground it had no bearing on the 30-day period that I had indicated that these newscasts had taken place, and I had argued that this reflects what happened afterwards, reflects on the truthfulness of what happened during that time, their comments, the manner of their comments.

The Court: Did either of you undertake over the noon hour to obtain any authorities on this question?

Mr. Packel: Well, may we see you at side bar?

The Court: Yes, of course.

(Discussion off the record at side bar.)

The Court: I will sustain your objection, Mr. Packel.

Mr. Packel: Thank you, Your Honor.

Mr. Paul: May I ask Your Honor a question?

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May I approach the bench to clarify your ruling so I won't go off on a tangent?

The Court: Yes, sure.

(Discussion off the record at side bar.)

(The following at side bar:)

The Court: Do you want to ask him whether he has ever been convicted; is that correct?

Mr. Paul: Yes.

The Court: You have no objection to that?

Mr. Packel: As long as it is being offered solely with respect to his character.

The Court: At this point I will limit it to that.

(End of discussion at side bar.)

By Mr. Paul:

Q. Mr. Rosenbloom, were you ever convicted of the crime of possession of obscene literature?

A. No, sir.

Mr. Packel: Your Honor, I have no objection to this question so long as it is understood that it is relating solely to the question of the character of the witness.

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The Court: At this point it will be so limited.

By Mr. Paul:

Q. Your answer was—

A. No, sir.

By The Court:

Q. I think that in order to clarify that, however, we have to know whether or not this charge against you was disposed of.

A. Your Honor, I was found completely innocent of every charge.

Mr. Packel: Your Honor, I am sorry; I ask that that last answer be stricken, Your Honor. I didn't hear it but I nonetheless ask that it be stricken, Your Honor.

The Court: I will deny the motion.

Mr. Packel: Now, may I hear what it was?

The Court: Sure.

The Witness: I was found innocent of every single charge that was ever placed against me.

Mr. Packel: Yes. I think I have stated, Your Honor, I don't think that it is pertinent and I just want to make clear for the record as to why I think that that is not properly admissible.

The Court: The difficulty, Mr. Packel, as

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I see it, is that I think clearly the fact that he was never convicted goes to his good reputation.

Mr. Packel: That's right.

The Court: Now, with these charges apparently pending, to ask him if he has ever been convicted and to stop there, the jury might conclude that they just never came to trial because you read in the papers all the time how the District Attorney is not ready to try his cases and so forth.

Mr. Packel: Do I understand Your Honor has permitted this still only again as to the question of his character?

The Court: At this time, that is correct.

Mr. Packel: That is also true as to his later comment?

The Court: That is correct.

Mr. Packel: Then I have no objection.

By Mr. Paul:

Q. Sir, you heard the prior testimony of Mr. Rust, did you not?

A. Yes, sir.

Q. Did you personally hear any of these broadcasts that Mr. Rust testified to?

A. No.

Q. Do you know others that heard these broadcasts?

A. Yes.

Q. Were any comments made to you about these broadcasts?

Mr. Packel: I object, Your Honor.

The Court: Overruled.

By Mr. Paul:

Q. Were there?

Mr. Packel: Well, do you mean he is just to answer this yes or no?

The Court: Well, I am going to permit the comments.

Mr. Packel: That is what I would object to, Your Honor, because that is—

Mr. Paul: Maybe I better ask the question, sir.

Mr. Packel: Yes, I am premature.

By Mr. Paul:

Q. Your answer was—

A. I didn't hear the question.

Q. Were any comments made to you about these radio broadcasts?

A. Yes.

Q. Now, would you tell the jury—let me ask you how many comments were made to you?

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Mr. Packel: I object, Your Honor. It is a prelude to what my real objection is going to be and that is with respect to the comments on the basis that the persons who made them should be here to testify.

The Court: Overruled.

By Mr. Paul:

Q. Tell me.

A. I couldn't possibly count all the comments that people that knew me told me about, what they heard about me on the radio.

Q. All right, for instance you dealt with newsboys as a rule; is that correct?

A. Yes.

Q. Did any of them make any comments to you?

A. Yes.

Q. Now, which one do you recall made the first comment? Who?

A. The newsstand operator at Germantown and Lehigh, a fellow named Irv Markowitz.

Q. Now, when was that, approximately?

A. Approximately a month after—sometime in November of 1963.

Q. Right. Now, what did he say to you?

Mr. Packel: Objection, Your Honor.

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The Court: Overruled.

Mr. Packel: I want to make clear for the record the reason for my objection, Your Honor, and the reason simply is that this is hearsay of the most ordinary type.

There is no reason why this person can't be brought into court to make the statement that he said, and I have no opportunity to cross-examine when he just says somebody told him this.

The Court: I think that this is a verbal act and I think it is admissible not only as to that but also to show the state of mind of the declarant.

Mr. Packel: The state of mind of the declarant? This is a month after he heard the broadcast.

The Court: I don't know.

Mr. Packel: That is what he testified. He said this was a month later he talked to this person.

The Court: Yes.

Mr. Packel: This is not an instantaneous reaction.

The Court: I don't think it has to be to be an exception to the hearsay rule, under state of mind.

Mr. Packel: Well, except in those cases where you are trying to prove the state of mind the issue is what is the state of mind of that individual.

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The Court: Right.

Mr. Packel: But that is not being offered for that purpose.

Mr. Paul: We don't offer it for the truth of the statement but—

The Court: I think the state of mind of the declarant is relevant here.

Mr. Packel: The state of mind of a declarant who heard a broadcast? I think I made my position clear.

By Mr. Paul:

Q. What did he tell you?

A. Irv told me that WIP radio was really blasting me, they were really knocking me.

Q. And did he say anything else?

A. He said it's a shame.

Q. Don't go into that, that's all right. As a result of—

The Court: Just a minute.

Mr. Paul: Yes.

The Court: I don't believe that that falls within the ruling that I made.

I will strike that last answer.

Mr. Paul: Yes, sir.

By Mr. Paul:

Q. As a result of what he said to you, what effect did it

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have upon you?

A. Well, as a result of what he told me that time I was in no condition to try to even work the rest of that day, I was so upset.

Q. Did other people—you said other newsboys reported to you what they heard; is that right?

A. Yes.

Q. As a result of what these other people said to you how did that affect you?

A. When I tried to do business with them 34 of the 60 people that were originally my customers, 34 of them refused to do business with me. They told me, in fact, "You are a racketeer. We won't have anything to do with you."

Mr. Packel: I am going to ask all of this be stricken. It is not responsive to the question.

He is volunteering information that is not in answer to the question.

The Court: Overruled.

By Mr. Paul:

Q. Further, sir,—

By The Court:

Q. This was their reason for refusing to do business with you?

A. Yes, sir.

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Mr. Packel: I would like some clarification. When you say "this was," what are we referring to?

The Court: I understood because they told him he was a racketeer they wouldn't do business with him for that reason.

Mr. Packel: They told him he was a racketeer? I am sorry, I didn't understand that.

By Mr. Paul:

Q. And besides the newsboys you had friends and relatives, did you not?

A. Yes.

Q. Did any of them tell you they heard any of the broadcasts?

A. Yes.

Q. As a result of what they reported to you, how did you feel?

A. As recently as this past November an incident occurred. The day of the first snowstorm this winter I took my car over to a service station in Oxford Circle and Roosevelt Boulevard to get my snow tires put on the car. The name of the station is Jack Brouse Sunoco Station.

By coincidence when I walked in a first cousin of mine, a son of my father's sister who has not spoken to me since the publicity that I received on the radio, never once, when I walked in the door he said, "Hey, how you doing,

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George? Are you still in the rackets?"

Mr. Packel: I will object to what the conversation was. This is two years later, he is referring to a conversation.

The Court: I don't know if there are continuing effects. They can't be arbitrarily cut off.

Mr. Packel: I have no objection to him saying what effect it had upon him and what statements were made. I think that is within Your Honor's ruling, but I think the actual words of the other person, I don't see the relevancy.

Mr. Paul: Again we don't offer it for the truth but merely that they were made and they had an emotional effect upon him which, as Your Honor knows, is an element of damage.

The Court: Yes, I will permit it.

By Mr. Paul:

Q. Now, he was a relative. How about friends? Did you have any problems with any of your friends?

A. I would say that the number of friends of mine that haven't spoken to me since they heard about me on the radio, it is almost impossible to count them.

Q. Have you lost any friends?

A. Yes, quite a few.

Q. Have you lost contact with any relatives?

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A. Yes.

Mr. Packel: Let's not lead him. Let's not lead the witness.

By Mr. Paul:

Q. Do you have any brothers or sisters?

A. I have two brothers, yes.

Q. Have you had contact with them since this publicity?

A. I think that I have seen my older brother about three times since October 1, 1963.

Q. And why have you only seen him three times?

A. It would be hard to say all of the reasons but he has never called me once since the publicity that I have received.

Q. What kind of man is he? What does he do?

A. My brother Paul is Director of Special Projects for the Math Department of Columbia University.

Q. What is his full name?

A. Professor Paul Charles Rosenbloom.

Q. How long has he been a professor?

The Court: Oh—

Mr. Packel: Your Honor, this has gone too far.

The Court: Yes, we are going very far afield.

By Mr. Paul:

Q. Let me direct your attention to the first radio broadcast complained of which we have marked Exhibit P-1, and I will

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hand it to you. Tht is P-1?

A. Yes.

Q. Now, would you turn to the section that refers to you, or to this incident.

A. Yes.

Q. Now, does that mention you by name?

A. Yes.

Q. Now, would you tell the jury what is untruthful if anything about that broadcast?

A. In the second sentence it says, "In the 1800 block of Vesta Street." I never lived on Vesta Street.

Q. It also says:

"Police confiscated 1000 allegedly obscene books at Rosenbloom's home—"

Did you have 1000 obscene books in your home?

A. No, this is completely wrong.

Q. Did you have any?

A. I never had any.

Mr. Packel: When you read that to him, read it to him, "allegedly obscene."

Mr. Paul: I said, "allegedly obscene."

Mr. Packel: I wasn't sure. I wanted to make sure.

The Witness: It says here, "The police con-

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fiscated—"

Mr. Packel: May I hear his answer to the first part of the question?

(The following question and answer read by the reporter:)

"Q. It also says:

"Police confiscated 1000 allegedly obscene books at Rosenbloom's home—

Did you have 1000 obscene books in your home?

"A. No, this is completely wrong."

Mr. Packel: The question says obscene.

Mr. Paul: Mr. Packel doesn't know what I am going to ask next, because the words "allegedly obscene" has the connotation—

Mr. Packel: It was magazines they took.

The Court: If you let him finish the question maybe you would have a proper objection.

Mr. Packel. Let's start again. I am not trying to complicate matters.

The Court: Yes, I think we will get this a little more in focus.

By The Court:

Q. Mr. Paul has been asking you about any inaccuracies or errors?

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A. Yes, sir.

Q. In this news broadcast. You said that you never lived on Vista Street. You did live on Vesta?

A. No, sir, Nester, N-e-s-t-e-r.

Q. And then it says:

"Police confiscated 1000 allegedly obscene books at Rosenbloom's home—"

A. Yes.

Q. Was that correct?

A. No, sir.

Q. What was incorrect about it?

A. They took from my home approximately 100 magazines.

The Court: All right. All right, Mr. Paul.

Mr. Paul: Yes, sir.

By Mr. Paul:

Q. Further, the article goes on to talk about—

Mr. Paul: One moment, please.

(Brief interruption.)

By Mr. Paul:

Q. Will you continue your answer?

A. Yes, it says here:

"—and arrested him on charges of possession of obscene literature."

They did not arrest me. I wasn't even home.

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Q. Well, how did you come to get in the hands of the police?

A. Approximately 6:30 that night I surrendered myself to Captain Ferguson with you.

Q. Where?

A. At 21st and Hunting Park Avenue.

The Court: Excuse me.

By The Court:

Q. I understood that you were arersted on the Tuesday morning?

A. Yes, sir.

Q. At 15th and—

A. Market.

Q. —Market Street?

A. Yes, sir. That was on Tuesday, but this is Friday morning.

Q. The Friday after that?

A. Yes, this is October 4.

The Court: I see.

Mr. Packel: He testified there were two arrests, Your Honor.

The Court: All right.

By Mr. Paul:

Q. Sir, the article goes on, as you will read there; it mentions the Special Investigations Squad. That is Captain Ferguson's Special Investigations Squad? They are the group

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that made this entire arrest?

A. Yes.

Q. That is correct, is it not?

A. Yes, but it says here:

"—also raided a barn in the 2000 block of Welsh Road near Bustleton Avenue and confiscated 3000 obscene books."

This is not correct.

Q. What is incorrect about it?

A. They took 1000 magazines. There were ten cases of a magazine called Eden and this is what they took, and that's all.

Q. What is Eden?

A. Eden is the primary magazine published by the Outdoor American Corporation.

Q. What type of magazine is it?

A. It is a nudist magazine.

Q. Incidentally, where are these people's offices located locally, for this area?

A. Their offices are located in Mays Landing, New Jersey, at the Pine Forest Lodge which is a nudist camp owned by Mr. Norval E. Packwood.

Q. Is he one of the publishers?

A. He is the vice-president of the Outdoor American Corporation.

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Q. And it also says here, "3000 obscene books."

Were any of your books obscene?

A. No, sir.

Q. Now, were you a main distributor of any type of material in the city of Philadelphia?

A. No, sir. I was the newest and smallest dealer, distributor, in Philadelphia on October 4, 1963.

Q. What was your volume on that day, 10-4-63? Did you have—do you measure—

A. On October—

Q. Excuse me, I will let you answer the question. Your volume, what was it on this date?

A. I didn't have any. I didn't do a penny's worth of business on October 4, 1963.

Q. I mean your general business up to that date; what volume had you reached, your peak, your peak volume?

A. Approximately two weeks before, or around the 15th of September, I had received a shipment of 5000 Eden magazines plus two other—I can tell you the exact magazine, what I received—

Q. I am not asking you the exact amount, just approximately.

A. About 7000 magazines were received approximately two weeks before.

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Q. Did you distribute all those?

A. About three-quarters of them, yes.

Q. And do you know your competitors' volume?

A. Yes.

Q. The closest competitor to you, what was their volume, approximately, around that time?

A. Vision Distributors probably had a distribution of double of what mine was.

Q. Who was the biggest distributor?

A. Dale Book Company probably distributed at least ten times to fifteen times my volume.

Q. You are talking about nudist books?

A. Yes.

Q. How about the United News Company; did they handle any nudist books?

A. Yes.

Q. What was their volume?

A. Their volume was very small in the nudist magazine line.

Q. Did they distribute any of Outdoor American's product?

A. No, nobody distributed but me. I was the sole distributor of the Outdoor American Corporation's magazines in the entire Philadelphia area.

In fact, I was the only distributor in the entire United States that only distributed Outdoor American's

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magazines and nobody else's.

Q. Why did you limit yourself to that one particular category?

A. This was the understanding that we had agreed to early in May when I first started that. They wanted to see if a man who would limit his efforts strictly to their magazines and completely divorce himself from any other type, to see if he could make a go of it, and I was really doing very nicely.

The reason that they wanted to try this was—

By The Court:

Q. The reason who wanted to try it?

A. The reason that Outdoor American Company wanted to see if one man just handling only their merchandise could make a go of it was they wanted to try to divorce themselves completely from all of these other distributors or publishers or people who would trade on their good name and bring a taint to them, and they just wanted to get away from that completely and—

Mr. Packel: I think he has answered the question.

The Court: So do I.

Mr. Packel: And much beyond it, Your Honor.

By Mr. Paul:

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Q. All right. Now, I direct your attention to the next broadcast in P-2.

Now, would you read the first sentence and see if that is correct?

A. Yes, the first sentence is correct.

Q. It says, "allegedly obscene books."

A. No, no, no.

Mr. Packel: Your Honor, this is very improper. He said it is correct and you are trying to—

The Witness: The first sentence here says:

"Captain Clarence Ferguson's Special Investigations Squad this afternoon—"

That is the first sentence here and that is correct. The second one here is:

"—raided the home of—"

Mr. Packel: Your Honor, let's not have him confuse the jury. It is all one sentence. It is not two sentences.

The Witness: I am sorry, I misunderstood.

Mr. Packel: You misunderstood.

Mr. Paul: If you want to cross-examine now I will stop.

The Court: Just a minute. Go right ahead.

By Mr. Paul:

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Q. Finish, please.

A. "—raided the home of George Rosenbloom in the 1800 block of Vesta Street—"

That is not correct.

"and confiscated 1000 allegedly obscene books."

Which is not correct.

Q. Why is that not correct?

A. They only took about 100 magazines from my home.

Q. All right.

A. And there were no books involved.

Q. All right.

A. "Rosenbloom was arrested—"

I was not arrested. I wasn't home.

Mr. Packel: I didn't hear that.

A. (Continuing) "—and will be given a hearing tomorrow—"

Mr. Packel: Rosenbloom was not arrested and what was said after that?

The Court: He said I was not arrested, I wasn't home.

By Mr. Paul:

Q. All right.

A. "—and will be given a hearing tomorrow in Magistrate Raymond Malone's Court."

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There is a correction here. It is typed in "Malone," and it is crossed out and it says my name "Rosenbloom" here.

"— is free on bail at the present time from a previous charge of distributing obscene material."

Q. Is that correct?

A. Yes.

"The Special Investigations Squad also raided a barn in the 2000 block of Welsh Road near Bustleton Avenue and confiscated another 3000 obscene books."

That is not correct. There was only 1000 magazines.

"Police believe they have hit the supply of a major distributor of obscene literature in Philadelphia."

Q. Is that correct?

A. No.

The Court: Well, now, I think we have to draw a distinction here, it seems to me.

By The Court:

Q. You are saying I take it, Mr. Rosenbloom, that you were not a major distributor of obscene literature in Philadel-

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phia?

A. Yes, sir.

Q. And that that part of the sentence is incorrect?

A. Well, sir, I was never a major distributor of anything.

Q. I understand that, yes, and that part of the sentence is incorrect.

You don't know, do you, about the first part of the sentence:

"Police believe they have hit the supply—"?

A. No.

Q. You don't know what the police believed, do you?

A. No.

The Court: All right.

Mr. Packel: His answer was—

The Court: No.

Mr. Packel: He doesn't know.

By Mr. Paul:

Q. Would you put that down and go on to P-3?

A. Shall I read this?

Q. No, I don't want you to read it. Is there any reference to you there?

A. Yes. Wait, yes.

Q. Where are you reading from: "This arrest follows—"?

A. No, it says in the second sentence:

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"More than 4000 reportedly obscene books were picked up during this afternoon's raid on Rosenbloom's home, —"

Q. What is incorrect about that?

A. Well, they took 100 magazines, not 4000.

Q. All right. Now, there is some reference in there to another story about John Bronzi and Russell Labue. Do you know either of them?

A. No, I never heard of them.

Q. Did you ever do any distributing in Baltimore?

A. No, in 1964, early in 1964 in an effort to see that I should try to make a living, Outdoor American Company also allotted me the Baltimore territory, but that was about three months after the arrests, after this occurred.

Q. Incidentally, as a result of these broadcasts did you have any difficulty in Trenton, New Jersey?

Mr. Packel: When you say these broadcasts, do you mean WIP broadcasts?

Mr. Paul: That's right, WIP broadcasts.

The Witness: I am sorry?

By Mr. Paul:

Q. Did you have any difficulty as a reslut of these broadcasts in Trenton, New Jersey?

A. Yes.

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Q. Did you distribute there?

A. Yes.

Q. Did you distribute in Harrisburg, Pennsylvania?

A. Yes.

Q. Did you have any difficulty there distributing?

A. No.

Q. And you have Exhibit P-4 there?

A. No, I don't have it. Yes.

Q. Would you read—turn to the section that refers to you.

A. Yes.

Q. All right, now, would you read it to yourself and point out to the jury what is incorrect and untruthful?

A. Well, they say, "—confiscated 1000 obscene books."

Mr. Packel: It doesn't say 1000 obscene books. Please, if you are going to refer to it, read it correctly.

The Witness, Oh, O.K.

"Captain Clarence Ferguson's Special—"

Mr. Packel: I am not saying you should read the whole thing. If you make a reference to something, make it correctly.

The Witness: "—Investigations Squad this afternoon raided the home of 42 George Rosenbloom in

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the 1800 block of Nester Street and confiscated 1000 allegedly obscene books."

They took 100.

By Mr. Paul:

Q. Books?

A. They took 100 magazines.

Q. All right.

A. "At the same time the squad also raided a barn Nester rented on Welsh Road in which they picked up another 300 allegedly obscene books."

They took 1000 magazines.

"Rosenbloom is free on $1000 bail from a previous raid on newsstands in the city last Tuesday."

Q. Is that correct?

A. That was not correct, either. I was free on $500 bail.

Q. And then you—you were given a hearing the next day?

A. Yes.

"He will be given a hearing tomorrow on charges of possession of obscene material."

Yes.

Q. Put that down and go to P-5. Do you see the reference in there to you?

A. Yes.

Q. What is incorrect about it, or untruthful?

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A. It says here:

"Rosenbloom was picked up Friday, with about 1000 of the reportedly obscene books on hand."

I didn't have any books on hand.

Q. Incidentally, do you know what an obscene book is?

A. Yes.

Q. Have you seen any?

A. Yes, in my life I have seen them, yes.

Q. Did you ever distribute any?

A. No.

Q. Did you ever have any conversations with Captain Clarence Ferguson?

A. Yes, three times.

Q. When was that? When was the first occasion?

A. The first time was about 2:00 o'clock in the afternoon on Tuesday, October 1. We were standing beside my truck and Captain Ferguson said—asked me, he said, "Where do you operate from?"

And I said, "My home;" and that's all he ever asked me.

By The Court:

Q. When was this?

A. On Tuesday afternoon, October 1, following the mass arrests, and we were standing beside my truck and he asked

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me, "Do you operate from your home?"

And I said—no, he asked me, "Where do you operate from?"

And I said, "From my home."

By Mr. Paul:

Q. When is the next occasion you gave Captain Ferguson any information?

A. The next time I spoke to Captain Ferguson was about 6:30 Friday evening, October—Friday, October 4, when I surrendered myself to him.

I seen the man that I had rented the barn from in the office, in the station house, and I went over.

Q. Was this barn near your house?

A. Yes, it was about two doors from my home.

Q. That is where you kept your merchandise?

A. Yes.

Q. All right.

A. And I went over to Captain Ferguson and I said, "Captain this man is absolutely not involved in anything I do and please release him because he has nothing to do with what I have done. All I did was rent a barn from him."

Q. And did you—

A. That was the extent of that conversation.

Q. Did you have another conversation with Ferguson?

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A. Yes, the third conversation took place on the steps of the police station at 17th and Montgomery about 10:30 Saturday morning, Friday—Saturday, October 5, following the hearing where I was held for $500 bail and I went outside.

I was standing on the steps and I lit a cigarette. Captain Ferguson came over to me and he said, "I want to warn you to be careful. We know everything that you are doing."

And I said, "Captain, I have nothing to hide. You are perfectly welcome to check me any time."

And that was the extent of my three conversations with Captain Ferguson.

Q. Did you have any other conversation with him?

A. With Captain Ferguson?

Q. Yes.

A. Never.

Q. Did you report to any police official the size of your business?

A. No.

Q. Or any department, law enforcement department of the City of Philadelphia the size of your business?

A. No.

Q. Did you ever tell the radio station the size of your

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business?

A. They never asked me anything.

Q. You never had any conversation with the radio station?

A. They never asked me once, even to this day. They have never asked me a single question about anything that happened.

Mr. Packel: I don't think he answered the question. It is not responsive.

May we have the question read and have him answer the question?

The Court: Well, if he is satisfied with it, that is all that counts. He is the one that asked it.

Mr. Packel: The only thing is it leaves uncertain the answer to the question that is put.

The Court: That is up to him.

Mr. Paul: Sir—

The Court: I agree with you, but that is up to the interrogator.

By Mr. Paul:

Q. Sir, did you ever go to the radio station after these broadcasts for any reason?

A. Yes.

Q. Did you ask them for any information concerning these broadcasts?

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A. Yes.

Q. Tell us what happened.

A. About somewhere in the neighborhood of October 27 or in—the 26th or the 27th of October my wife and I stopped in to a luncheonette in the Oxford Circle area. We had been customers in there for about three or four years and the man who owned this store knew us by sight but not by name, and the conversation started—

The Court: This is not—really not responsive.

Mr. Paul: Sir, this is really the circumstances of him going—I could ask the question but this is really the circumstances of him going down to the radio station.

Mr. Packel: Let him tell us what happened. We have no objection to him saying that he went to the radio station but let's hear what happened.

Mr. Paul: I was—would ask the question anyway, the circumstances of going to the radio station.

The Court: All right, that is not the question.

Mr. Paul: I realize that.

By Mr. Paul:

Q. Would you tell us the circumstances of going to the radio station, as you just were?

A. The owner of this luncheonette told me—

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Mr. Packel: I object, Your Honor. I don't want to hear what somebody told him.

Mr. Paul: I think it is pertinent to the circumstances.

Mr. Packel: He can say what he did as a result of being told.

Mr. Paul: Well, there again, Your Honor, I am not asking it for the truth of what the man said but merely that he was told something that put him in a frame of mind that chased him down to the radio station.

I think the jury is entitled to know what upset him so much. The man could have said, "I hear you are selling apples" and he ran down to the radio station to see—

The Court: It is hard to tell, Mr. Packel, whether it is relevant until I hear what it is.

Mr. Packel: Except it is rather clear that he is just repeating a conversation. If he wants to say—

Mr. Paul: I can give you some law—

The Court: Just a minute, Mr. Paul and Mr. Packel.

Mr. Packel: If he wants to say—

The Court: From now on we will follow the program of one person speaking at a time. I will try not

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to interrupt you and you try not to interrupt me, and both of you try not to interrupt each other. All right.

Mr. Paul: Thank you, sir.

The Court: I don't believe that is relevant.

By The Court:

Q. What did you do as a result of this conversation? Did you go to the radio station?

A. Yes, sir.

Q. All right, what happened when you got there?

A. I went up to WIP around 11:00 o'clock I believe it was, on a Friday morning, and identified myself and I—the receptionist asked me what I wanted and I told her that I had been told that WIP had stated that they ought to take a man like that and lock him up and throw away the key.

Mr. Packel: Wait.

The Court: Just a minute. This is hearsay.

Mr. Paul: May I show you some law on that, sir? Would you—

The Court: No, I don't believe so. This is pure hearsay.

Mr. Paul: If Your Honor is sustaining the objection—I was wondering if I could approach the bench and give you some law and give you some argument because there are some other statements that are as important.

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The Court: This has to be offered for the truth of what has been said.

Mr. Paul: No.

The Court: I think even on balance unless you can prove this by direct evidence, balancing the probative

effect against the hearsay, the probative value does not outweigh the potential harm and I will include it.

By Mr. Paul:

Q. Just tell us what happened at the radio station.

A. Well, I explained to the receptionist that certain statements had been made about me and I would simply like to either hear them or read them to see whether or not the report that I had received was true.

The receptionist told me to sit down and wait a minute, so I sat down. About two or three minutes later she said, "Mr. Rosenbloom, will you please pick up this telephone here?"

Mr. Packel: Your Honor—

Mr. Paul: I don't think this is harmful.

Mr. Packel: No, I just don't want him to say something that someone told him that may have some significance.

The Court: That's right.

Mr. Packel: Other than what he did.

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By The Court:

Q. As a result of what she said to you did you pick up the telephone?

A. Yes, yes.

Q. All right.

A. And again I identified myself on the telephone as to who I was and why I was there and I asked who I was speaking to, and the voice on the phone said, "John Paul Weber."

And I explained to him that some people had told me certain things that they had heard on WIP and I would like

very much either to read them or to hear them to be sure of what I heard, that what I was told was the truth, and he told me, "Hold on a minute."

The next thing, the next 30 or 40 seconds later I started to hear the beeps that you get when the conversation is being recorded, and another voice came on the phone and identified himself as Mr. Nate Wright, and again I asked him—I told him who I was and I said that I had been told certain things that you people have been talking about me and I would like to either read them or hear them to see whether or not what I was told was the truth, and he told me that, "Well, we have broadcasts for 24 hours a day, twice an hour;" that it would be impossible unless I could identify closer than—to the exact time,

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I had to identify the time closer before they could do anything, so I said, "Well, I can identify one time."

I said, "How about October 21, 1963 at 12:00 o'clock?"

He said, "O.K., wait a minute, we will look it up for you;" and during all this time this beep is going on that the conversation is being recorded.

About a minute or so later they read the news broadcast that—where they said, they mentioned about two publishers and a distributor and the smut-girlie racket and the smut peddlers' claims that the city's actions are bad for business.

This is what they put—what this man read to me over the telephone, so I asked him, I said, "Are you aware that the magazines involved in this were found to be completely legal and legitimate by the United States Supreme Court?"

And the voice came back, "Well, the District Attorney said that they are obscene."

I said, "Are you sure you are quoting the District Attorney correctly because I have in my possession a public

statement by the District Attorney that my magazines are completely legal, absolutely nothing obscene about them."

And at that point the telephone conversation

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was terminated.

By Mr. Paul:

Q. How was it terminated?

A. He just hung up. They hung up. That was it.

Q. Now, sir, let me direct your attention to the next publication which would be P-5.

A. P-5?

Q. P-6. You testified to P-5. P-6.

Would you read it to yourself and tell the jury if that is substantially correct?

A. It is basically correct except for the 1000 allegedly obscene books. There weren't any obscene books involved.

Q. Turn to P-7.

A. It is the same as the other.

Q. Is it substantially correct?

A. Yes, except for that one thing.

Q. I have to hear you.

A. Yes, it is substantially correct except for the mistake of 1000 allegedly obscene books.

Q. Will you put that down and go to P-8? Will you turn to the section that refers to you and look it over and tell us what is incorrect or untruthful about it?

A. The last sentence is not correct.

Q. What is the matter with it?

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A. Well, it says here:

"—then was rearrested yesterday after several thousand copies of allegedly smutty periodicals were confiscated from his apartment and a nearby barn."

I was never charged with handling smutty periodicals. I was never involved with smutty periodicals and I don't know where they got that from.

Q. All right, turn to the next broadcast, P-9. Now, that is October 21, 1963?

A. Right.

Q. At 6:30 A. M., is it not?

A. Yes.

Q. That is about 16 days later?

A. Yes.

Q. Correct?

A. Yes.

Q. Now, did you take any action in the Federal Court?

A. Yes, sir.

Q. And who else—you were a plaintiff?

A. Yes.

Q. Who else was a plaintiff with you; anybody?

A. Yes, my publisher, Outdoor American Corporation.

Q. Were there any other publishers involved?

A. No, sir.

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Q. Were there any other people involved?

A. No, sir.

Q. And beside yourself and your publisher and attorney and the people actually involved in this case did anybody else know you went to court?

A. Yes, everybody in the magazine business knew because in the entire Philadelphia area this had never happened before, where a distributor or a publisher had tried to protect themselves in the Federal Court.

Q. Now, what judge did you appear before?

A. We appeared before Judge John W. Lord, Jr.

Q. And who were the defendants in that case?

A. The defendants were the City of Philadelphia, the Commissioner of Police, Mr. Howard Leary, the District Attorney, Mr. James Crumlish, the Philadelphia Bulletin, the Triangle News Publications, which is the Philadelphia Inquirer, and WCAU-TV.

Q. Now, did your suit have anything to do with girlie books?

A. No.

Q. Did any of your papers or records allege anything about girlie books?

A. No.

Q. Why were you in court?

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A. We went into court for three reasons. The first reason was to stop these illegal arrests against me and my home and my wife.

The second reason was that both my publisher and I felt that he was entitled under the constitutional right of freedom of speech, that even though there were a lot of people who might disagree with his philosophy of life or the type of magazines that he wanted to print, to further this way of life, he did have the right to say it, he did have a right to believe this, and I felt strongly that he had the right and someone had to take a stand to help with this right, and the third reason was I wanted to try to get this news media to stop printing all these lies about me.

Q. Now, did you ever have any plea in this case about economic hardship or financial difficulties, in this injunctive process you were asking in the Federal Court?

A. I think we did but I don't remember exactly the way we put it.

Q. Was there anything—did you make any statement to the Court or did anybody during these proceedings, either written or spoken, make any statements to the Court that borderline literature or smut or filth is hurting your business, that references in that manner were hurting your business?

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A. No, no one ever—I never heard Judge Lord mention my magazines as smut or filth and there was never a question that they were borderline literature.

Q. Did anybody in the Federal Court, anybody associated with this case say anything about your literature or any literature being smut or filth?

A. No, it was never mentioned in that way before in court that day.

Q. Did you have any comments about this broadcast from any of the newsboys or in the industry?

A. Yes.

Q. Did anybody refuse to do business with you because of this broadcast?

Mr. Packel: It is not only leading, Your Honor, it is irrelevant.

Mr. Paul: I am trying to be as—

The Court: It is quite leading.

By Mr. Paul:

Q. Yes, let me put it to you this way. I will retract that question to meet the objection.

As a result of this broadcast which you are referring to now did anything—what happened? Did anything happen to your business?

A. Yes, I had a number of prospective accounts refuse to

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deal with me because they said, "You are in the rackets and we just can't deal with you."

I had 34 of—

Q. Excuse me, excuse me. I am not—I am just referring to this one broadcast. I think you went beyond my question; just this one broadcast.

Do you recall that day? Will you look at the date, 10-21-63 at 6:30 A. M.?

A. Oh, yes. I have had—I had people say to me that—

Mr. Packel: I object to what people said to him again.

By The Court:

Q. Does this relate as to whether or not they would do business with you?

A. Yes, sir.

The Court: I will hear it.

The Witness: I had some prospective, real big accounts tell me that, "Well, you are a girlie-book peddler. We can't deal with you. You are the kind of fellow that we just can't do business with."

Mr. Packel: I will just ask this be stricken, Your Honor, these indefinite things that are not related to any specific incident, no specific name given, or anything of that sort.

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The Court: Yes, I think we ought to have a little more specificity.

By Mr. Paul:

Q. Let's take a specific instance. Did you deal with anybody over in Camden?

A. Yes, sir.

Q. Who did you deal with over in Camden?

A. I had dealt off and on for the six years that I worked for United News with a particular—a large account at Broadway and Cooper in Camden, New Jersey.

This one account is probably the largest account in the entire South Jersey area. This account, we had projected this account—

Mr. Packel: I will object to this, Your Honor, what he projected for the account. It is—

The Witness: Based on—

Mr. Packel: I assume—

Mr. Paul: Wait.

By The Court:

Q. This is a prospective account?

A. Yes, sir.

Mr. Packel: But he is speaking of what he projects in the future. I don't see the relevancy of that other than the fact that he may have lost something.

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There is a way of proving damages but this isn't it.

The Court: That's right.

Mr. Paul: I will ask him another question.

By Mr. Paul:

Q. You have dealt with this account before?

A. Yes.

Q. You have business records on this account?

A. No, I don't—I dealt with this account when I worked for United News.

Q. That is what I am talking about. Do you have records that you kept from United News?

A. Yes, but not with this particular account.

Q. Did you know the size of this account?

A. Oh, yes. He is known throughout the entire industry as the key account in South Jersey.

Q. Just tell us what happened; don't tell us how large it is, without projecting any figures.

A. After my trial, after—when I was cleared and after I went back into business in Philadelphia and after over half of my original accounts had refused to do business with me I tried to open up new accounts to—just to get my business back to where it was.

This one account could more than have done that,

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so I went into the man. I know the man well.

I said, "Jack,—"; his name was Jack Ackerman.

I said, "Jack, I would like you to handle my magazines" and he said to me, "Well—"

Mr. Packel: For the record, I want to object to—I think Your Honor did say I have a standing objection.

The Court: No, I didn't.

Mr. Packel: Then I do want to object to what he was told.

The Court: Overruled.

Mr. Packel: I have given the reasons for it.

The Court: Yes, I am admitting this as to the motive, the reasons why these people would not deal with him.

Hold on just a minute. You might want to take a look at this case that I sent for, Mr. Packel.

Mr. Packel: Yes, Your Honor. There are three cases that deal with it. I am probably aware of the one you are talking about but it is an unsettled matter and that is why I—I think I am aware of the one.

Is it an antitrust case?

The Court: No, it is a libel action.

Mr. Packel: There are two antitrust cases which deal with this point, as to the rejection of customers

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because of conduct, and I think the law is unsettled.

That is why I wanted to save the record.

The Court: I think it has been settled ever since the Danbury Hatters case, Lawler vs. Lowe.

Mr. Packel: I know the cases you mean.

The Court: I think if you will read that you will see—just read that part that I have marked off there with red marks.

Mr. Packel: Yes, as a matter of fact this point is argued in one of the courts the other day, just the other day.

The Court: I am following this one.

Mr. Packel: I think there is a difference.

The Court: I overrule your objection.

By Mr. Paul:

Q. What did he say to you?

A. Well, I walked in and I said, "Jack, everything is straightened out, the magazines are clear, I am back in business in Philadelphia and I would like very much to be able to put my magazines into your location."

Mr. Packel: Do we have the time on this? It may have been said and I may have missed it.

By Mr. Packel:

Q. As of what time is this taking place?

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A. This took place—well, all of these things took place over a period of about two months, during June and July of 1964, this series of events that I am explaining to you.

By Mr. Paul:

Q. All right.

A. I went into this location and I told him that of course everyone knew that I had been found innocent and I had been cleared completely in Philadelphia so I said, "Jack, I would like very much to be able to put my merchandise in your store."

And he told me, he said, "Well, I don't know whether I will or won't, but before I even consider it, go talk to my attorney. If you can get him to agree, then I will think about it."

So I went over to his attorney and I spoke to him and he said he would like to talk to my attorney, so I asked Mr. Paul to contact him and—

Mr. Packel: I am going to object to anything that may have transpired in this course of events.

The Court: Oh, yes.

Mr. Paul: I don't think he has testified to anything I said.

The Court: I don't know what is going to eventuate from this.

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Mr. Packel: So long as he is cautioned not to say what Mr. Paul told him.

Mr. Paul: I don't think he will.

By The Court:

Q. Let's hear what happened.

A. Mr. Paul contacted this man's attorney and after their conversations, Jack Ackerman's attorney told him that it was perfectly legal.

Mr. Packel: Whoa!

Mr. Paul: Don't say that.

The Court: Oh, yes.

By Mr. Paul:

Q. All right, don't tell—as a result of what Jack Ackerman's attorney told him—you had a further conversation with Jack Ackerman about selling your books and magazines?

A. Yes.

Q. What was that conversation with Jack Ackerman?

A. I went back to Jack Ackerman and he agreed with me; yes, his attorney agreed it was perfectly—

Q. Don't say what his attorney said, just what Jack Ackerman said.

A. Well, Jack Ackerman said even though he said it's all right, the County Prosecutor or the City Solicitor, that's right, the City Solicitor of Camden may not be aware of that,

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so I said, "Well, shall I have my attorney contact him?"

He said, "Sure, go ahead."

So Mr. Paul contacted Mr. George Stransky, who was the City Solicitor for the City of Camden.

Mr. Packel: I am going to object to this. We are getting so far away—

The Court: We really are getting far afield.

Mr. Paul: If Your Honor would like an offer of proof at side bar, it is relevant, and I think I can convince Your Honor.

The Court: If he could only get to it without all of this hearsay.

Mr. Paul: If I may ask him a question?

By Mr. Paul:

Q. You had somebody on your behalf contact the City Solicitor to talk to Mr. Jack Ackerman again; is that correct?

A. Yes.

Q. As a result of that you talked to Mr. Jack Ackerman again?

A. Yes.

Q. And what did he say to you when you talked to him again?

A. He said that, sure, the City Solicitor knows but—

The Court: No, I am going to cut off

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this line of inquiry.

Mr. Paul: Well, then, I realize, sir, it is difficult to try to cut it.

By Mr. Paul:

Q. Did you ever deal with Jack Ackerman? Did you ever sell him any of your books?

A. No.

Q. Did you ever find out why?

A. Yes.

Q. Now—

The Court: Go ahead.

By Mr. Paul:

Q. When did you find out why?

A. He told me to come back to his store in the evening when his wife was there and I returned when Jack Ackerman and his wife were there.

Q. Did they both operate the business?

A. Yes.

Q. All right.

A. And she told me, she said, "We will never deal with you because we have heard that you are a racketeer and we don't want nothing more to do with you."

And that was it.

Q. All right.

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A. I never done business with them.

Q. Did she say where she heard it?

A. She said, "We heard about you on the radio."

So I said, "Well, what you heard isn't necessarily true."

She said, "They wouldn't say anything that is not true."

Q. Did she identify the radio?

A. Yes.

Q. What radio did she identify?

A. WIP.

Mr. Packel: Your Honor, I ask this be stricken. This does not go to intent now.

The Court: Oh, yes. I think it does.

Mr. Packel: No, not what station it was heard from.

The Court: That is right. That is hearsay. You are right.

Mr. Packel: This is clearly hearsay.

The Court: You are right. You are right. It is stricken.

By Mr. Paul:

Q. Were you in his store—you were in Jack Ackerman's store?

A. Yes.

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Q. Did you notice a radio there?

A. Yes.

Q. Was it playing?

A. Yes.

Q. And how many times have you been in the store when that radio was playing?

A. About 40 times, at least.

Q. Will you tell us out of those 40 times what station did you hear tuned in?

A. I always heard WIP. It was always tuned in.

The Court: We will recess.

• • •

(Short recess.)

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By Mr. Paul:

Q. Prior to this testimony concerning this incident you had read the reports, and you had read in P-10, had you not?

A. I hadn't read this one in P-9 yet.

Q. You finished reading P-9, had you not?

The Court: P-9 I think you did go through.

Mr. Paul: He said that.

The Court: Maybe you hadn't finished it.

By Mr. Paul:

Q. Had you finished P-9?

A. No, in fact, I hadn't actually mentioned anything. The first sentence here, it says:

> "Federal District Judge Joseph S. Lord, III will hear argument today from two publishers and a distributor."

I would say that that first sentence is completely false, completely wrong. It was Judge John W. Lord, Jr., and it involved one publisher, Outdoor American Corporation, and one distributor, me.

Q. Why is the publisher important to you, if at all?

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A. Because this was the only publisher that I represented and it was the only publisher that had ever taken this type of action in this area, ever.

Q. Well, did the newsboys, the people you sold to, know who your publisher was?

A. Absolutely. In fact, they would use us as an umbrella to protect many other things they would do.

They said, well, as long as they had us, had our magazines and had me distributing to them, in effect, we would cover up anything that could happen to them because we would have to protect them.

They knew that Outdoor American Company and Mr. Mounce had had a history of always defending their ideas and their magazines.

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By Mr. Paul:

Q. Would you continue reading P-9?

A. Yes.

"A local television station and a newspaper—"
This is not correct. It was three newspapers, not one.

By Mr. Packel:

Q. It was what?

A. Three newspapers.

By Mr. Paul:

Q. Go ahead.

A. "ordering them to lay off the smut literature racket."

I was never involved in the smut literature racket. There was never—I never heard in any court or anything that we have had where the words "smut literature racket" was ever brought up. I don't know where they got that from. It wasn't—no word was ever mentioned about that in court.

"The girlie-book peddlers say the police crackdown and continued reference to their borderline literature as smut or filth is hurting their business."

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I was never a girlie-book peddler and the magazines I distributed were never borderline literature. I just don't know where they got this statement because there was never —I never heard it, not in court. No one else did either in court.

Q. All right.

A. "Judge Lord refused to issue a temporary injunction when he was first approached. Today he'll decide the issue. It will set a precedent if the injunction is not granted."

I would say that that is completely wrong because it would set a precedent if the injunction would have been granted. It would have been the first time in the history in

this area that a publisher and a distributor had gone into Federal Court to protect their right of free speech.

"It could signal an even more intense effort to rid the city of pornography."

Well, I don't know how I could be tied in with pornography. I never had any—

Mr. Packel: I am sorry, I didn't hear.

A. (Continuing) I don't know where I could have been tied in here with pornography. There was never any mention of that anywhere in any of the court proceedings. They were

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never mentioned in the charges filed against me by the police. They never mentioned pornography.

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By The Court:

Q. Did you attempt to get back into business?

A. Yes, sir.

Q. What did you do in an effort to do that?

A. Everything that I could think of, every single thing I could think of.

Q. Including what?

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A. Including cooperating with the police, including cooperating with the District Attorney's office, including cooperating with the Attorney General's office of the State of Arizona, including cooperating with the District Attorney of the City of Phoenix, including cooperating with the District Attorney of the City of Richmond, Virginia, including cooperating with the county detectives of the Burlington County, New Jersey.

By Mr. Paul:

Q. And what were you trying to accomplish with this cooperation? What was the purpose of it?

A. To simply educate the law-enforcement agencies as to who was publishing what and how to distinguish from the legitimate people who are trying to honestly further a belief, and those people who are trading on their good name.

Q. And what efforts did you make in the City of Philadelphia along that vein?

A. In the City of Philadelphia I worked with two county detectives from the District Attorney's office. On numerous occasions they would ask me to come into their special offices in City Hall on the seventh floor and review different periodicals and publications and books and magazines and to identify for them the publishers, the sources, where they were coming from and how to aid in stopping it.

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I made a trip with two county detectives to New York City to show them from a mass display of how they could identify each individual type book and magazine, who published it, how it came into the city and where the source was.

Q. Now, did that—any of these efforts help you to get back into business or increase any of your sales?

A. No.

Q. Did any of the newsboys know what you were doing?

A. No.

Q. Why did you do it?

A. Because Mr. Creskoff, who was the Assistant District Attorney in charge of the Obscene Division, and his predecessor, I don't recall his name now, had asked me if I would cooperate with them since I am so well known in the area and since I know through my own personal knowledge all the details about who, where and why.

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By Mr. Paul:

Q. Would you turn to P—I think you finished P-10. Did you look at P-10 yet?

A. No, P-9.

Q. Would you look at P-10 and the reference there made to you, to your case?

A. Yes.

Q. Or to your product?

A. This one sentence here that:

"Two publishers and a distributor argue in court today economic and financial hardship in police crackdown on alleged smut literature."

Q. Is that correct? Is there anything—

A. Well, one publisher and one distributor were in court, yes. We didn't have anything to do with alleged smut literature, no.

Q. Is there any doubt in your mind that this broadcast or

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the following broadcast referred to you or your business?

A. There was no doubt in anyone's mind.

Mr. Packel: Objection, Your Honor.

The Court: Sustained.

By Mr. Paul:

Q. Not anyone's mind, I am talking about your mind.

A. Oh, no. There could be no doubt in my mind.

Q. Now, turn to P-11, would you please? P-11, if you will look at it, is substantially what you had examined before in P19; is that correct?

Mr. Packel: I think His Honor has already pointed out it is identical.

The Court: That's right.

Mr. Paul: He is going to tell me that also. I am sure he will.

A. Yes, this is the same as this.

Q. And so if I asked you similar questions your answers would be substantially the same?

A. Yes.

Q. Would you lay that aside and go to P-12? Take a look at that.

A. It says:

"Smut distributors today seek an injunction against police raids in Philadelphia."

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Q. All right, what is wrong with that, and why?

A. I never was a smut distributor.

Q. All right, would you turn to P-13? Lay that aside. Could you look up the reference there made to you?

A. Oh, yes.

Q. Is there anything incorrect or inaccurate or untruthful about that?

A. Yes.

Q. What?

A. Well, again it refers to two publishers and a magazine distributor. It should be one publisher.

"The complainants charge they are being hurt economically by the current crackdown on smut."

We never complained about the current crackdown on smut. We complained about the illegal arrests that were being made against me.

Q. So that wording you are saying is not yours; is that correct?

A. It is not true.

Q. Would you put that aside and go to P-14? Would you look at what they say to you, what they say concerning you in the case? Do you see that?

A. Yes.

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Q. Is there any doubt in your mind that that is relating to you and your case?

A. No, there is no doubt in my mind as to that.

Q. Is there anything inaccurate about it?

A. Yes.

Q. Tell the jury what.

A. "The D.A.'s office and communications media lodged by publishers and distributors of alleged smut literature."

I never distributed any smut.

The Court: Keep your voice up.

By Mr. Paul:

Q. Keep your voice up.

A. I never distributed any smut.

Q. All right, would you lay that aside and go to P-15? Would you look at what it says about you there?

A. Yes, it says:

"Argument before—"

Q. I don't want to know what it says, I want to know what is inaccurate, if anything.

A. Well, they refer to District Judge Joseph Lord, III, and it is not so. It should be John W. Lord, Jr.

Q. Do you know the difference?

A. Yes, sir. I know the difference.

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Q. All right.

The Court: I won't ask you which you would rather have. I guess I better not.

Mr. Paul: He has met both of you.

The Witness: Sir, I found both judges to be very fair.

The Court: Oh, I will tell him.

By Mr. Paul:

Q. Is there anything else inaccurate?

A. Well, it is publishers, plural; it should be publisher, singular.

"The City's crackdown on alleged smut literature—"

This is not correct.

Q. Keep your voice up, sir.

A. "A TV station, the Evening Bulletin and the D.A.'s office are the target of two publishers and one distributing firm."

Mr. Packel: I thought this was the one where he—the two had been changed to one.

Am I incorrect on that?

By Mr. Paul:

Q. Are you reading it correctly? Is there a correction there?

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A. Yes. Excuse me.

By Mr. Packel:

Q. Is there a correction? I thought this was the one.

By Mr. Paul:

Q. Is there a correction on that page you are reading?

A. Yes.

Q. So it does say one publisher there?

A. Yes.

Q. Is that right?

A. Yes.

Q. Will you lay that aside and go to P-16? Is there any reference made to you or your case?

A. Yes.

Q. Do you see it?

A. Yes.

Q. Will you look at it and tell the jury if there is anything inaccurate or untruthful there?

A. Yes.

Q. What is it?

A. It says:

"—petition of two publishers and a distributor—"

It should be one publisher.

Q. Anything else?

A. "—who are asking an injunction against

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further raids by police and the D.A.'s office on smut publications."

This is very, very wrong because we didn't object to any raids, we objected to illegal arrests, and the D.A.'s office and smut publications, Mr. Crumlish swore that—

Mr. Packel: Your Honor—

By Mr. Paul:

Q. Don't tell us what Mr. Crumlish said. Was the D.A.'s office involved in any of these raids?

A. Not to my knowledge, no.

Q. Was there any mention of it in court during your federal proceedings that the District Attorney's office was involved in the raids?

A. No.

Mr. Packel: I think the testimony has been that the District Attorney was one of the defendants.

Mr. Paul: But was not involved in the raids.

Mr. Packel: Is that the distinction you are making?

The Court: Why don't you wait a moment.

Mr. Packel: I am sorry.

By Mr. Paul:

Q. What was the role of the District Attorney during these arrests?

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A. He acted as the prosecutor.

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By Mr. Paul:

Q. Is there anything else inaccurate about that P-16? That is P-16 we are reading from, is it not?

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A. Yes.

Q. Is there anything else inaccurate?

A. No.

Q. All right, would you lay that aside and go to P-17? Will you tell us if there is any reference in there to you or your cases or your business?

A. Yes.

Q. Would you tell us, are there any inaccuracies?

A. Yes.

Q. Tell the jury what they are.

A. It says here:

"Two publishers and a distributor—"

Pardon me.

"In Federal Court later today two publishers and a distributor of alleged smut literature—"

Again it is one publisher.

"—will go before Judge Gold, claiming they are suffering economic and financial hardship because of a recent crackdown on such material."

It was Judge Lord, not Judge Gold.

Q. Were you ever before Judge Gold for anything?

A. Never.

Q. You were in the local courts, were you not?

A. Yes, sir.

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Q. All right.

A. It was Judge—

Q. All right, I didn't ask you. Will you lay P-17 aside and turn to P-18?

The Court: There is one thing I would like to ask.

Mr. Paul: Yes, sir.

By The Court:

Q. In this suit that you had before Judge John Lord, did you ask for any action, whether by injunction against raids or otherwise, against smut literature?

A. No, sir.

The Court: All right.

By Mr. Paul:

Q. Will you turn to—I think we are looking at P-18. What is the next number?

A. P-18.

Q. Would you see if there is any reference made to you there?

Mr. Packel: P-18?

Mr. Paul: Yes, P-18.

A. Yes.

Q. And would you look through it and see if there are any inaccuracies there and tell the jury what they are?

A. Yes.

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Q. Tell the jury what they are.

A. It says:

"Attorneys for a TV station, the Evening Bulletin, Police Commissioner Leary and the D.A.'s office have been given until Friday to prepare legal briefs outlining their request for dismissal of a suit seeking to halt the recent series of raids on smut literature and pornographic material. The petition for an injunction against the raids was instituted by two publishers and a magazine distributor."

Well, we didn't seek to halt the series of raids, we asked that all the illegal arrests be stopped.

We never said in our papers anything about smut literature and certainly pornographic material was never involved.

Q. All right. Would you lay that aside and go to P-19? Would you see if there is any reference made to you there?

A. Yes.

Q. And would you tell—point out to the jury what is inaccurate or untruthful?

A. It says:

"The Philadelphia District Attorney, Police Commissioner Howard Leary, a TV station—"

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By The Court:

Q. Can't you do this without reading the whole thing, Mr. Rosenbloom?

A. Oh, sure, yes, sir.

"—from further raids on local newsstands in a hunt for pornographic literature."

This was never involved.

By Mr. Paul:

Q. You explained that before; the same reason?

A. Yes.

Q. Anything else?

A. Yes, it says two publishers.

Q. You explained that before, did you not?

A. Yes.

Q. Anything else?

A. No.

Q. All right, and would you look at the next one which would be P-20? See if there is a reference made to you and

just point out what if anything is inaccurate, without reading the whole thing.

A. Yes, again they refer to Judge Joseph Lord, Jr. They refer here to "further smut raids."

Q. You have explained that, haven't you?

A. Yes.

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Q. Anything else?

By The Court:

Q. Two publishers instead of one?

A. Yes.

By Mr. Paul:

Q. Just look at the last one, P-21. That is your last number. Would you look through that and see if there is any reference made to you that is inaccurate?

A. Again they refer to smut. That would be it.

Q. Did you make any claims for loss of business?

A. No.

Q. Put them aside, sir.

Mr. Packel: What was the last question?

Mr. Paul: Did you make any claims for loss of business?

Mr. Packel: His answer was—

Mr. Paul: His answer was no.

Your Honor, shall I continue? We have two additional areas to cover, which will complete his testimony. One area is—I don't know how lengthy it is. It seems lengthy to me, and another area is not so lengthy.

I don't know if you want to continue because of the hour.

The Court: Why don't you go a little bit further?

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Mr. Paul: All right.

By Mr. Paul:

Q. Mr. Rosenbloom, in the—

The Court: Before you do, does anybody have any train problems?

Juror No. 8: 4:37.

The Court: For Reading?

Juror No. 8: Yes.

The Court: All right, is 4:15 all right for you?

Juror No. 8: Yes.

The Court: All right, just go a little bit longer.

By Mr. Paul:

Q. As a result of these radio broadcasts were you disturbed in any way?

Mr. Packel: Well, first I object, to make clear which radio broadcast he is talking about. I assume he is only talking about WIP broadcasts.

If he corrects that, then I think the question—

Mr. Paul: I will rephrase the question.

Mr. Packel: I have no objection.

By Mr. Paul:

Did you have any mental anguish as a result of these

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radio broadcasts?

The Court: No, that is not the way to do it.

Mr. Paul: I will rephrase that.

Mr. Packel. It is slightly leading.

By The Court:

Q. What effect, if any, did these radio broadcasts have on you?

Mr. Packel: And by "these" do you mean the WIP radio broadcasts?

A. As far as WIP radio broadcasts are concerned a number of people told me all about them, but they never and I never heard—

Mr. Packel: Your Honor—

The Witness:—any broadcasts from any other radio stations that—

Mr. Packel: Your Honor, I object to this.

The Court: Sustained.

By Mr. Paul:

Q. Just tell us what happened to you.

A. Well, as a result of the publicity I received—

The Court: Just a minute.

By The Court:

Q. Am I correct in my understanding that you didn't hear any of these broadcasts yourself?

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A. That is correct.

Q. You did not?

A. No.

The Court: All right, go ahead.

By Mr. Paul:

Q. I want to know what happened to you?

The Court: As a result of what?

Mr. Paul: These radio broadcasts.

The Court: How could he know that?

Mr. Paul: Other people told him what was going on and it had an emotional effect on him.

The Court: That is hearsay.

Mr. Paul: I don't care what they said; whatever they said, it had an effect.

The Court: How does Mr. Rosenbloom know that it came from the WIP broadcasts?

Mr. Paul: Certainly he testified earlier somebody made some statements; he charged down to WIP and he had a conversation with them and I am sure he is going to testify as to what effect this had upon him.

The Court: It seems to me, Mr. Paul, that the only way that this witness could know that the information received by other people came from WIP would be on hearsay testimony.

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Mr. Paul: If I may answer that, sir, regardless of how he knew of the radio broadcasts we can establish that it did have some sort of effect on him.

If people stayed away from him or wouldn't deal with him, which he has already testified to, I am sure he didn't find that very pleasant, and it had some effect on him.

The Court: That is not my point, though.

Mr. Paul: Yes.

The Court: This injunction that was sought was not even against WIP. It was against three newspapers and a television station.

Now, what is there to point to the fact that whatever effect this had on his friends or his relatives, which in turn had an effect on him, what is there to show that that came from WIP and not from WCAU or the three newspapers that were involved?

Mr. Paul: I think he has testified prior that the only statements—I think he has already testified to that, sir, that he heard—the statements were made to him which had a relationship to WIP, which caused him to react toward WIP.

The Court: I don't believe so. I think I specifically sustained Mr. Packel's objection to the—

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Mr. Packel: Conversations.

The Court: —statement by Mrs. Ackerman that it came from WIP.

Mr. Paul: Yes, sir, but then he testified—I think there was a circumstantial connection. He testified that every time he was in Doc Ackerman's store, which was 40 times, and every single time he was there he heard WIP radio.

The Court: That might be an inference for the jury, but that is as to that one person.

Mr. Paul: Then he also testified as to meeting at Danny Chuse's restaurant and Danny Chuse making some statement of what he was told by WIP, some of the things that they said about him. They admitted some things after he went down there and he picked up a telephone and had a conversation with them.

The Court: That may be true. That merely indidicates that certain things, certain statements originated with WIP.

It does not mean that they fell on the ears of the people who were telling him this.

Mr. Paul: Not directly, sir; not directly, but circumstantially. That is what I am trying to say.

The Court: I will tell you what I will do.

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I will give you the weekend to think that over.

Mr. Paul: Yes, sir.

The Court: Maybe you will come in with an answer, I don't know, but I will give you the weekend to try.

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MORNING SESSION

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The Court: Good-morning. All right, Mr. Paul.

——

GEORGE A. ROSENBLOOM, resumed.

DIRECT EXAMINATION
(Continued)

By Mr. Paul:

Q. My last question to you, Mr. Rosenbloom, was what effect did these radio broadcasts have upon you personally other than your business?

Mr. Packel: Again by "these broadcasts" you mean WIP broadcasts?

Mr. Paul: Right.

A. Well, I got to a point where I was almost unfit to live with. Every time I would think about it I would get to a point where my wife couldn't even talk to me. I kind of exploded almost at the least words she would say to me.

I couldn't sleep at night. I think I gained about 30 pounds inside of a month. I couldn't control my appetite or anything. I had just—well, I just was almost unfit to live with. That's it, I suppose.

Q. Has there been any change in that circumstance today?

A. Well, I guess I am still pretty touchy to live with. [227]
I try to control myself but every time I start thinking about it—

Q. How have these broadcasts affected your business, or has it affected your business?

A. They put me out of business.

Q. Would you explain how? Are you in business today?

A. No.

Q. Would you explain to the jury how, or what happened?

A. Well, when I tried to go back in business after I was completely cleared, out of the 60 accounts that I had 34 of them refused to do business with me.

Q. How much did that represent to you in dollars?

Mr. Packel: I object, Your Honor.

The Court: I think you have to lay a—more of a foundation than that, Mr. Paul.

Mr. Paul: Yes, sir.

Mr. Packel: May I also see you at side bar in this connection, Your Honor?

The Court: Yes.

(Discussion at side bar off the record.)

The Court: Members of the jury, so that you won't be completely mystified about what is going on, this question of law has been raised and it should properly be discussed outside of the hearing of the jury, so we are

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discussing it here at side bar.

It is, however, simply a question of law that I have to rule on.

(Discussion off the record at side bar.)

The Court: You may have noticed, ladies and gentlemen of the jury, that I am being assaulted with law books. I think what I am going to do, rather than risk severe personal injury here, I will consider this matter in the safety of my chambers where I am more adequately protected by my own law boks.

There have arisen not only one legal question now but several which I guess we ought to dispose of before we go forward with the testimony, so what I am going to do is I am going to let you go until 11:30 and counsel and I will go up to my chambers and see if we can resolve these with the help of my own library up there, and if we haven't finished by 11:30 then—but you be back anyway by 11:30, in the box, and if we haven't finished by that time I will come down and let you go for such further time as I think we need.

You see, the problem that we run into is that maybe we should conclude our decision on these matters by 11:30, but I have to contend with two lawyers and when lawyers start talking there is really no telling when it is

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going to stop.

I will do my best to control it but anyway, be back by 11:30.

(Recess at 10:45 A. M.)

(The following in chambers at 11:25 A.M.:)

The Court: Several points have been raised and argued out of the hearing of the jury. A fair condensation of those points, it would seem to me, is as follows, and I invite counsel to correct me at any stage.

The first point that was raised came in connection with the effort of the plaintiff to show his monetary losses. The defendant objected, raising the question that the business was actually a partnership composed of the plaintiff and his wife, and that the suit should have been brought by the partnership, and that no damages can be recovered by the partnership in this action.

Do I fairly state your position, Mr. Packel?

Mr. Packel: You do, Your Honor.

The Court: I have ruled that the plaintiff may recover his individual damages, referring to the case of Simpson vs. Steen, 127 Fed. Supp. 132, and particularly at page 140.

It is my ruling that given a proper foundation

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the plaintiff may show the losses to the partnership not as a basis of recovery by the partnership but as an evidentary basis of his own pecuniary losses brought about by the libel.

The defendant of course is given an exception to this ruling.

Have I fairly stated the substance of our discussion?

Mr. Packel: You have done it very fairly, Your honor.

The Court: Mr. Paul?

Mr. Paul: Yes, sir.

The Court: The second question arises in connection with a proposed witness to be called by the plaintiff. The witness is offering to show that he heard one of the broadcasts and that it went beyond the script which has been previously testified to by the witness Rust.

In interrogatories the defendant asked the plaintiff:

"By date, time and exact words set forth the broadcasts which plaintiff claims were defamatory."

In answer to that interrogatory the plaintiff set forth the full text of a number of broadcasts but did not set forth the language of the broadcasts to which the witness allegedly will testify.

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Mr. Paul: May I interrupt?

The Court: Yes, Mr. Paul.

Mr. Paul: Two things skipped my attention. No. 1, we have another point we are offering the witness for, on another point. As you recall the testimony earlier, Your Honor, of the plaintiff, he testified that this man, Daniel Chuse, which is his name, whose name I have also supplied to Mr. Packel, made some comments to him in a restaurant after listening to a broadcast, because of his comments, Mr. Rosenbloom ran

down to the radio station and had some further discussion with them.

I was also offering that witness to show that these comments were made to him after the man had listened to the broadcast and had an effect upon Mr. Rosenbloom which caused him to react in a certain manner; that also.

However, further and apart from that, Your Honor, which I did not—it came to my mind, we did not state on our memorandum as to what this witness would say, it is true. However, Mr. Packel did interrogate—take the deposition of Mr. Rosenbloom and Mr. Rosenbloom did tell Mr. Packel in depositions what that witness would say so he is not surprised by what he is going to testify on the stand and I think that we should be allowed to introduce it at this time since it wouldn't prejudice Mr. Packel.

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The Court: No, I think that the defendant's interrogatory fairly called for a response that would give the witness' version of the broadcast that he heard and the words that were used.

The plaintiff has also argued that since Mr. Rust testified that there was no ad lib from the script, that this witness should be permitted to testify to the language that went beyond the script in order to impeach the credibility of Mr. Rust.

Inasmuch as Mr. Rust was called in the plaintiff's own case—yes, Mr. Packel?

Mr. Packel: Your Honor, may I suggest that I do not think you have to go as far as you are going because there are times when you can impeach your own witness, particularly when he has been called on cross-examination.

The Court: Yes.

Mr. Packel: I thought Your Honor was going to rule on that basis but it seems to me that there should be considered the point that you can't attack the credibility of the witness that you have called on cross-examination as to a matter which is not a substantive point in the case.

The Court: Well, I would agree with that too but I would further rule, even though there has been no objection by the defendant, that Mr. Rust was not properly

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called as of cross-examination because I do not think he is a managing agent within the scope of Rule 43 and therefore I will not permit that testimony.

Mr. Paul: If Your Honor recalls he did testify that he ran the entire newsroom.

The Court: That is true, he did, but he wasn't—I don't think he is a managing agent of this corporation.

Mr. Paul: If Your Honor would indulge me one moment I may be able to show you something in the depositions which may change your ruling.

Those questions were asked, and then depositions were taken. Mr. Packel asked the same question of Mr. Rosenbloom as to what he was relying on and during those depositions Mr. Rosenbloom did—he took him point by point through the things he was relying on.

Mr. Rosenbloom did mention Danny Chuse and apprised him of the witness.

The Court: I can't hear you.

Mr. Paul: He apprised him of what Mr. Chuse would say. If I may show you this in the deposition it

may change your thinking. I don't know if it will or not.

Mr. Packel: It is not a question of surprise, it is a question of he had to substantively set forth what

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he was claiming were the defamed words.

The Court: What was the date of the deposition?

Mr. Paul: The date of the deposition was July 24, 1967.

The Court: This may very well change my ruling. If you asked him at a later time what he was relying on and he told you this, then I think maybe it would change my ruling.

Mr. Paul: Sir, Mr. Packel asked a series of questions. I will hand you the depositions.

The Court: It might be better if you gave them to me.

Mr. Paul: Yes.

Mr. Packel: I don't have my copy here.

Mr. Paul: He starts here and—starts on page 12 and asks him a series of questions concerning the matters we are relying on.

The Court: Let me just take a look at it.

Mr. Packel: May I read over your shoulder?

The Court: No, that is one thing I hate.

The deposition of the plaintiff was taken on July 24, 1967 and the answers to interrogatories were filed on June 5, 1967.

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During the course of the deposition of the plaintiff and on page 25 the plaintiff reported—or the plaintiff described reports to him from certain witnesses as to the nature of the announcement. The difference essentially was that the announcer added to the script that they ought to take a man like that and lock him up and throw away the key.

Following that testimony from the plaintiff he named five persons who told him that they had heard this broadcast at 6:30 P. M. on—

Mr. Packel: October 4.

The Court: —October 4, 1963.

I think that this fairly apprises the defendant of the statement and of the testimony, particularly in light of the fact that—did you say you gave Mr. Packel the name of the witness?

Mr. Paul: Yes, a list of the names, yes, and his address.

The Court: And his name and address was listed?

Mr. Packel: Yes.

The Court: Particularly in view of the fact that the name and address of the witness was listed.

Mr. Packel: I merely make this point, Your Honor. I at no time contended that I wasn't apprised of the

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nature of this testimony, but I contend and still contend that the claims on which there is a basis for defamation have to be set forth in the answer to the interrogatory.

Your Honor probably knows that in many states the complaint itself has to set forth the exact words which are the words of defamation. I don't think that is required under Federal Rules; however, when the question is specifically put as to what item do you claim there was defamation, and the answer is made as is indicated here, and there is no reference to these words which do not appear in the script, it is my position that he hasn't substantively established it as one of his claims, this additional language, so I do not and did not mean to base my objection to such testimony on the ground of not being apprised that they claimed to have such evidence but on the basis that in asking them to set forth the specific language on which their claim is based they did not choose to put that originally, nor did they choose to amend the assertion of what the basis for the claim was prior to trial.

The Court: Well, I will permit the testimony and grant you an exception.

Mr. Packel: Thank you.

(End of discussion in chambers.)

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(The Court convened at 11:45 A. M.)

GEORGE A. ROSENBLOOM, resumed.

DIRECT EXAMINATION.
(Continued)

By Mr. Paul:

Q. Sir, you testified that you started your business on May 1 of '63; am I correct?

A. May 5.

Q. May 5, 1963?

A. Yes.

Q. And when you started your business what type of business entity was it?

A. It was a partnership between my wife and myself. We were known as G. & L. Distributors. The G stood for me, George, and the L stood for Leona, my wife.

Q. What compensation were you taking from that partnership?

A. Well, the profits that I would make between what it cost me to buy the magazines and what I sold them for.

Q. Were there any other employees besides yourself?

A. No.

Q. Did you in this partnership, did you pay any other people or persons for services?

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A. No, I ran the business completely by myself.

Q. And prior to these broadcasts how many accounts did you have?

A. 60.

Q. And what kind of accounts were they?

A. They were all kinds of accounts, large ones and small ones.

Q. I don't mean the type. Were they stores—that type of thing.

A. Yes, I had I would say roughly without going into each one, three-quarters of the accounts I had were stores.

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Q. Now, after the news broadcast what was the status of your partnership?

Mr. Packel: I will object, You Honor. I object on the ground of showing a lack of relationship between the news broadcasts. There has been no establishment of any relationship between the news broadcasts and the amount of business, the question of causation.

Mr. Paul: I could ask the question a different way but it would only come back to the same thing.

I will withdraw it and ask the question a different way to meet the objection.

By Mr. Paul:

Q. Those figures were based on 60 accounts as you previously testified to. Did you lose any of these accounts?

A. I lost 34.

Mr. Packel: I object, Your Honor.

I will withdraw the objection to that question.

The Witness: I lost 34 accounts.

By Mr. Paul:

Q. And you—why did you lose these accounts?

A. 34 of them refused to do business with me because they

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told me that they heard—

Mr. Packel: I will object to what they told him, Your Honor.

Mr. Paul: If Your Honor please, the testimony, if you recall the earlier testimony, the plaintiff did testify as to the state of mind of some of his customers and I was permitted to show his state of mind.

He is merely actually—he is merely reanswering the question to meet any objection Mr. Packel may have.

The Court: It seems to me, Mr. Paul, that we have a very thin line here. I agree that the motive is properly in evidence, but as to the source of the information which formed the basis of that motive, that, it seems to me, is hearsay and is not within any of the exceptions to the hearsay rule.

Mr. Paul: Yes, sir. We wouldn't offer it for the truth of the assertion but merely that the statement was made.

The Court: Then I think it has no relevance.

Mr. Paul: Well, I think Your Honor could caution the jury properly. I think you could instruct the jury as to how to handle that piece of the testimony.

He has already testified to a great portion

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already. If Your Honor would caution the jury on it and upon instructions they could find the proper relationship through your instructions, then I don't think any prejudice would be shown to Mr. Packel.

The Court: Well, I don't know about that. Clearly it seems to me that a witness could not testify here that somebody told him that they were listening to station WIP. That would be clear hearsay, it seems to me.

Therefore, I think that as to the source of the information, it inevitably has to be hearsay.

Mr. Paul: Would Your Honor indulge me for one moment? Perhaps I could clarify your thinking—or my argument, excuse me.

May I show Your Honor some law?

The Court: Sure, once again.

(Discussion off the record at side bar.)

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Q. Now, after September of '63 did your business grow in size?

A. Yes, for about a year it grew in size.

Q. Now, where were you principally writing your business?

A. In the Philadelphia area.

Q. What comprises the Philadelphia area?

A. It would be Philadelphia and like Levittown.

Q. Speak up.

A. I went—covered Philadelphia, Levittown, Pennsylvania; Bristol, Pennsylvania; Trenton, New Jersey; Florence, New Jersey; Norristown, Pennsylvania; Harrisburg, Pennsylvania; Wilmington, Delaware; Elkton, Maryland; and Baltimore, Maryland.

Q. What was your income when you worked for United News?

A. In the neighborhood of $5700 a year.

Q. And what was your maximum income when you were in this partnership?

A. While we were in partnership the maximum income would have been about $4000.

Q. And when did you reach that maximum?

A. In August of 1964.

Q. And in August of 1964 how many accounts were you servicing?

A. In the Philadelphia area, about 26.

Q. How about total, every area, the area that you just

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mentioned?

A. About 50.

By Mr. Packel:

Q. How many?

A. About 50.

By Mr. Paul:

Q. Do you know the number of accounts in that area?

A. Yes, sir.

Q. How many accounts are there in that area?

Mr. Packel: I will object, Your Honor.

The Court: I am sorry.

Mr. Paul: I asked him the number of accounts in the—he said he did business in the Philadelphia area, he described the area, and I asked him the number of accounts in that area.

The Court: Of his accounts?

Mr. Paul: No, of the accounts, of all the accounts.

The Court: Oh, sustained.

By Mr. Paul:

Q. Did you solicit any additional business during the time between 9-63 and the time you went out of business?

A. I tried to, yes. I called on 81 prospective accounts in the Delaware Valley area and I didn't get a single one,

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and those 81 accounts are in 51 towns or cities surrounding the Philadelphia area.

Q. Now, was there any reason for not getting these accounts, any reason advanced to you?

Mr. Packel: I will object, Your Honor.

The Court: Overruled.

Mr. Packel: This, Your Honor—I want to make clear the reason for my objection is he was asked what reasons were given to him.

The Court: That's right.

Mr. Packel: I think he is getting in indirectly what he couldn't get in directly.

The Court: No, not yet. We will wait and see.

A. This is a close-knit business in that everybody knows what everybody else is doing and the fact that I couldn't open up an account like Jack Ackerman or Shorty's Bus Stop or Dick's or when I would try to go to the next town and open it up they said are you doing business in the town before, and I had to say no because it was the truth, and some of them had heard about me and they said, "Gee, we can't deal with you anyway because you are in the rackets and we don't want to have nobody like that in our place."

Mr. Packel: I ask that that be stricken, about you are in the rackets.

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The Court: Motion denied.

By Mr. Paul:

Q. Would your number of accounts have changed the volume you did do business with before you went out of business had you gotten the Jack Ackerman account in Camden?

A. Positively.

Q. Would you tell the jury why?

A. This one account is like the key to the entire South Jersey area. If I could have opened this one account up I could have opened up four more in Camden, right outside of Camden; Fairview Bus Stop; I could have opened up Blackwood; I could have gone into Mt. Holly; I could have gone into Maple Shade, Collingswood.

Everybody in the South Jersey area knew that this one particular account was the biggest and everybody would

follow what this man would do. If he didn't—wouldn't deal with an account they wouldn't, and if he would, they would.

It is a very close-knit business and what happens at 69th and Market is known about in Camden, the entire area. It is a funny kind of a business and—

The Court: I think you have answered the question.

By Mr. Paul:

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Q. There were other distributors servicing these accounts, were there not?

A. Yes.

Q. Did you know these other distributors?

A. Yes.

Q. Do you have any idea and basis for that idea of what the 81 accounts represented to you in gross business?

A. Yes, sir.

Mr. Packel: I object, Your Honor.

The Court: Well, I would certainly want a foundation for this.

By Mr. Paul:

Q. You have dealt with a number of—have you dealt with a number of these 81 accounts before?

A. Yes.

Q. Did you have any personal knowledge of the type of business they were selling or undertaking?

A. Yes.

Q. And prior to going to any account did you have any information as to what the account was doing?

A. Yes.

Q. And where did you get that information?

A. I got this information from two sources; No. 1, when I worked for United News I knew the type of an account it was,

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the type of volume that they would—could be expected of them and the type of books or magazines that they would sell the most of.

Secondly, I was well known to every collector-salesman for United News and when I went into business every single one without exception gave me a list of any new accounts that might have been put on their route and at the same time reminded me of those good accounts that they felt would be able to merchandise my magazines, so I knew pretty well who to go to, where to go to, and just about what to expect from them.

Q. Now, when you talk about "expect," does the word "draw" mean anything to you?

A. Perfectly.

Q. What is a draw?

A. In the magazine business the word "draw" means the amount of magazines that a company will give to an account with the expectation that they will sell at least 90 per cent of the draw.

In other words, if an account would be—have on his records 100 draw it would mean that he would get 100 of this particular magazine or this particular book, and he could be expected to sell at least 90 per cent of those and usually within a week, depending on the magazine,

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this figure would be checked to make sure that he didn't have too many or that he needed more of them.

Q. Now, I will ask you again. What type of volume of business could you have expected from the 81 dealers?

Mr. Packel: Again, I object, Your Honor. I don't think he has laid a foundation. His work with United News was with an entirely different kind of magazine as I understand it and of course there is my fundamental objection that there has been no causation shown and therefore this evidence is inadmissible.

The Court: Overruled.

A. In my discussions with Mr. Packwood and the way we had projected the entire area that I was to cover, we had planned on the volume—

Mr. Packel: Your Honor, again I object.

By Mr. Paul:

Q. Don't tell us about Mr. Packwood, tell us about your own experience.

Mr. Packel: Again, I ask this evidence not be permitted because it is based—he started to say on these expectations.

The Court: Yes, I will limit it to his own experience.

By Mr. Paul:

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Q. Would you give us that answer, based on your own experience?

A. On my own experience I projected the immediate Philadelphia area, within the city limits, for a yearly volume of $130,188.15. We—the surrounding Delaware Valley—

By Mr. Packel:

Q. Repeat the figure, please.

A. $130,188.15.

By Mr. Paul:

Q. How did you come to that figure?

A. It was based on the amount that I had done prior to September of '63.

Q. Now, you said—how about the surrounding area?

A. The surrounding area, the 81 potential accounts in the 51 towns, I had projected for $382,000 a year.

Mr. Packel: Again I ask this material be stricken, Your Honor, and you will notice it is based on his expression of what the future might be.

The Court: Well, it is pretty speculative all right but I will permit it to stand.

By Mr. Packel:

Q. What was the figure? May I have that?

A. $382,000. I have it broken down if you want that, sir.

Mr. Paul: He will get to you later.

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By Mr. Paul:

Q. Now, what would have been your net profit out of those two figures?

Mr. Packel: I will object, Your Honor, unless we have a foundation laid here.

The Court: Sustained.

By Mr. Paul:

Q. How much did it cost you to operate your business?

A. About 5 per cent of my gross would be for running the business.

Q. 5 per cent of those two figures would have been what? Could you give us a rough calculation?

A. About $2500 a year.

By Mr. Packel:

Q. The figure you gave was $2500?

A. Just the cost of actually running this business, yes.

By Mr. Paul:

Q. You said 5 per cent. What are you taking 5 per cent of?

A. The projected volume. You said what would it cost me to run my business.

Q. What is the—

A. About 5 per cent of the gross volume.

Q. Would you make your calculation and see if you are correct on that? Would you tell me the figures you are using

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to make your calculations?

A. I am using the $382,080 and $130,188.

The Court: It comes to a little over $500,000.

The Witness: Right.

By the Court:

Q. 5 per cent of that is $25,000, I think.

A. Thank you, sir. I am kind of nervous today.

By Mr. Paul:

Q. Now, the money left, what did that represent? What was that?

A. Net profit.

By the Court:

Q. Didn't it cost you something for the magazines?

A. Yes, but we—I would work on a 20 per cent over cost. This was a figure set by the publisher. In other words, if a magazine retailed for $1 it would cost me .52 and I would wholesale it for .70, so I would make 20 per cent and the retailer would make 30 per cent and this is the reason that dealers prefer to deal with me, because their margin of profit with me was the highest in the industry.

Q. But that is not my question. My question is that out of these projected figures that you have given us, that wasn't all gross profit, was it?

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A. No, these are gross figures of the amount I had anticipated on doing.

Q. So that your profit would be 20 per cent?

A. 20 per cent of that, yes.

Q. And an additional 5 per cent for running the business?

A. Right.

The Court: All right.

By Mr. Paul:

Q. Where does the 5 per cent come from; the gross figure, or from the 20 per cent figure?

A. The gross. The 5 per cent—of the 20 per cent of my gross profit 5 per cent of that would be the cost of running my business.

Q. Would you break that down and let me hear them in actual figures instead of percentages?

A. I had anticipated a gross business of $512,188. I had anticipated a gross profit in excess of $100,000, and the cost to do business would have cost me $65,609.40.

Q. So it left you with what a year?

A. Approximately $35,000 a year.

Mr. Paul: Cross-examine.

CROSS-EXAMINATION

By Mr. Packel:

Q. You say you have your records here?

A. Yes, sir.

Q. All your business records?

A. Yes, sir. No, I have a record here of every day that

I worked and what I did and the amount of money I took in that day.

Q. Do you have your income tax records here?

A. No.

Q. Do you have income tax records for the years?

A. Sure.

Q. Would you be able to produce them?

A. Sure. My accountant has them.

Q. Would you please arrange to produce your records for the years '62 to '66? You are in a position to produce those?

A. Sure, yes, sir.

Mr. Packel: Would you consider this a formal demand for their production, Your Honor?

Mr. Paul: Of course, Your Honor, with the limitation that if time permits to run over to our accountant's office. We will produce it if we can get it. I don't know how much time it will take to do it.

I am perfectly willing to do it.

The Court: That shouldn't take long.

Mr. Paul: The business records are in Camden, New Jersey. We would have to run over there to get the

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accountant during tax season to get these records out.

The Court: Where is the accountant?

Mr. Paul: In Collingswood, New Jersey.

The Court: All you have to do is call him on the phone and ask him to get out his tax records for those years.

Mr. Paul: Yes, sir.

The Court: I am sure he has them indexed by clients.

Mr. Paul: Yes, sir.

The Court: You don't have to run over there, I don't think.

By Mr. Packel:

Q. I do understand from your testimony that your total gross for the month of September of 1963 was some $4600; is that right, your total gross?

A. Yes.

Q. Yes?

A. Yes.

Q. And I understand that the highest you ever earned in this business in either '63 or any later year was $4000 a year?

A. No, sir.

Q. Well, what was the highest? I thought you had given us

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a figure as to the highest earnings you had had in any one year after leaving United News?

A. No, sir.

Q. What was the $4000 figure then?

A. I was asked the amount that I earned when I was in partnership and that is the figure when I was in partnership.

Q. So the highest you ever earned in the partnership which was conducting this business in 1963, the highest you ever earned from that partnership was $4000?

A. That's right.

Q. Now, Mr. Rosenbloom, will you please answer yes or no to this question?

Were you or were you not twice placed under arrest on the charge of possessing obscene periodicals?

A. Yes, sir.

Q. Were you or were you not a party to a proceeding brought against the District Attorney, the City of Philadelphia, the Bulletin, the Inquirer, and others?

A. Yes, sir.

Q. Now, as to this lawsuit, you contend that there were misstatements made as to the last suit because there weren't two publishers and one distributor; is that right?

A. That's right.

Q. Well, was there one publisher and one distributor?

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A. Yes, sir.

Q. Are you sure?

A. Positive.

Q. Are you sure there weren't three parties to that action?

A. There was one publisher and one distributor.

Q. Are you sure that—

A. Positive.

Q. —there were just two parties? You are positive?

A. Yes, sir.

Q. If it wasn't two you are making a mistake, jcst as the newspaper made a mistake, or just as the radio station made a mistake; is that corerct?

A. There were two parties. It was my publisher, myself and my company, yes.

Q. That is three parties then; weren't the parties Outdoor American Corporation, G. & L. Distributors, and George A. Rosenbloom?

Weren't there three pa.ties?

A. Yes, if you count that.

The Court: We will recess until 2:00 o'clock.

(Noon recess at 12:30 P. M. until 2:00 P. M.)

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Q. Now, let's come back to the broadcasts. Now, you stated that the broadcasts about the seized books in the barn were incorrect because they were magazines and not books; is that

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right?

Is that portion right?

A. Part of it, yes.

Q. Now, you also objected, you said, that the report said there were 3000 when in fact you said there was only 1000?

A. Yes, sir.

Q. Are you pretty sure there were only 1000 seized in that barn?

A. Yes, sir.

Q. Are you sure of that?

A. Positive.

Q. You haven't said otherwise heretofore?

A. No, sir.

Q. Did you under oath answer depositions in the case of George A. Rosenbloom, Inc., trading as G. & L. Distributors against Triangle Publications, Inc., on October 26, 1964?

Mr. Paul: Objection, Your Honor. It has no relevance in this case.

Mr. Packel: Your Honor, I am attacking his credibility.

The Court: I understand that, yes. I am just checking the rule.

Why wouldn't this be a prior inconsistent statement, Mr. Paul?

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Mr. Paul: Well, depositions taken in another case which are not a part of this proceeding would leave me very—no opportunity to probe under what circumstances and how it was taken. I would be limited in probing the truth of any of these assertions, to clear up any inconsistency, because I have only part of a record of another proceeding which is not relevant to this proceeding and I would have to get into it a little more by finding out what this entire proceeding would be about, who asked the questions, the background for any statements made, and they are not properly a part of this record here.

The Court: Overruled.

By Mr. Packel:

Q. I show you the deposition and ask if that refreshes your recollection that these depositions were taken of you?

A. May I see this, please? This is not correct.

Q. What is not correct?

A. George A. Rosenbloom, Inc. There was never—

Q. Yes. That is not my question. Do you remember answering depositions on that date, or approximately that date?

A. Yes, yes.

The Court: What was the date, Mr. Packel?

Mr. Packel: October 26, 1964.

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By Mr. Packel:

Q. Now, do you remember Mr. Hill putting this question to you and your answering as follows, and I will give you a series of questions and a series of answers and ask you whether or not you did not make those statements.

Mr. Paul: I would object again, Your Honor. The basis for the foundation for these questions has not been properly made out.

The Court: Overruled.

By Mr. Packel:

Q. —and if you care to, you can read this with me, if you want to check them, whether or not this transpired.

"Q. Now, according to police record D-5 it states on Friday, October 4, 1965 (I hope the jury will excuse my back) at about 4:30 P. M. arresting officers armed with Search Warrant No. 23306 issued and signed by Magistrate Malone went to 2001 Welsh Road, a barn, and inside this barn the officers found and confiscated 17 cartons containing 1700 books titled Eden; is that correct?

"A. I don't know. I wasn't there.

"Q. You don't dispute there were 1700 books titled Eden there, do you?

"A. I don't dispute that."

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Now, did you not so testify?

A. No, sir.

Q. You did not so testify, under oath?

A. No, sir. I testified under oath but I did not say that and as far as this, these notes here go, there were so many

inaccuracies about those that we had requested a re-hearing of it to correct those, and the court reporter never could get together with me.

I can show you many inaccuracies in that.

Q. So you still insist there were only 1000 books seized; is that correct?

A. Yes, sir. There are two incorrections right on the cover of that, right on the outside cover of that. On those pages there is two incorrections and I will show them to you.

Q. Now, I ask whether this doesn't appear on page 87 of this transcript, by Mr. Hill:

"Did they confiscate 2700 magazines from you?

"A. Yes."

A. That is what it says there. I never testified to that.

Q. You are saying you never testified to that effect?

A. No, sir.

Mr. Paul: I am objecting to the use of these depositions. If you would prefer I would clarify this at

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side bar.

The Court: No, I overrule the objection.

What is the ground of your objection?

Mr. Paul: Those depositions have never been admitted to any judicial proceeding. There is a lot of inaccuracies and they could be straightened out.

The Court: He has made that clear.

Mr. Packel: Do you know what this is?

(Mr. Packel exhibited a group of papers to Mr. Paul.)

Mr. Paul: Do I know what it is?

Mr. Packel: Yes.

Mr. Paul: I know what it is.

By Mr. Packel:

Q. I show you a photostatic copy of a complaint and ask you if you recognize what that is?

May I show you the last page and ask you if you recognize that, although it is not too clear, whether you recognize that that is your signature?

A. Yes.

Q. And that is an oath that was taken, is that correct, to the correctness of the material that appears herein?

A. That's right.

Mr. Paul: Objection, Your Honor. I don't

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know the authenticity of this document.

Mr. Packel: I showed it to you and asked you if you knew what it was.

Mr. Paul: It is not in this case. We have the court record here. I have brought in court records in proper form.

I don't know if it has been copied accurately or properly.

The Court: I don't, either.

Mr. Paul: I don't think it can be used unless we establish a foundation as to what they are.

The Court: If it is his signature and he has admitted that it was, or that it is, rather, I see no reason why it can't be used.

Mr. Paul: If he is going to—the document may not be a genuine document or an exact copy. It is not the best evidence.

The best evidence is the court record itself.

The Court: Where is the court record?

Mr. Packel: It is a complaint in this court and I am sure he has got a copy of it, Your Honor. If he wants to check its accuracy—

The Court: Why don't you get the original?

Mr. Packel: I can. I think we would save

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time, however, if he would look at his own copy and see that this is a verbatim copy, and we are just wasting time.

Mr. Paul: I don't have a copy of the other proceedings here.

The Court: Why don't we get the original?

Mr. Packel: We can get it from the clerk's office.

Mr. Paul: How many questions are you going to ask on this?

Mr. Packel: It is Civil Action No. 34316, Your Honor.

The Court: Send for it, 34316.

Mr. Packel: Yes.

(The court file in the matter of Outdoor American Corporation and G. & L. Distributors and George A. Rosenbloom vs. City of Philadelphia and Howard R. Leary and James C. Crumlish, Jr., and the Evening Bulletin and Triangle Publications, Inc., and Columbia Broadcasting Systems, Inc., Civil Action No. 34316, was directed to be brought to the courtroom.)

Mr. Packel: Does Your Honor want to wait or can we proceed with the assumption that if it doesn't show that these are the facts, of course then the jury can disregard it?

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Mr. Paul: I have no objection to that.

The Court: Very good.

By Mr. Packel:

Q. Now, I ask you to read Paragraph 17 of this complaint which was filed on your behalf and which you have just said is signed by you.

Assuming that it is the same as in the court record, would you read Paragraph 17 to the jury?

Maybe let me read it and you tell me whether that is not what it is:

"Pursuant to the defendants' plan, —"

Mr. Paul: If I may, Your Honor, Mr. Packel asked the defendant to read—the plaintiff to read it. Now he is reading it.

The Court: It is customary to rise when you are addressing the Court, Mr. Paul.

Mr. Paul: I am sorry, Your Honor. He asked Mr. Rosenbloom to read it. Now he is reading it.

I don't have the benefit of following it. I will assume it is proper for Mr. Rosenbloom to read it and make whatever comments he may make.

The Court: All right, let him read it.

Mr. Packel: He was hesitating in proceeding.

By Mr. Packel:

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Q. Will you proceed to read Paragraph 17?
A. Sure.

"The Defendant, Triangle Publications, Inc., through its agents, servants and employees, on or about October 2, 1963 and October 3, 1963, did publish or cause to be published in their daily newspapers, The Philadelphia Inquirer and Philadelphia Daily News, certain stories, pictures and articles referring to the plaintiffs' magazines and books as smut and obscene, in a false and malicious manner, and characterized—"

Q. Wait. You are not reading Paragraph 17.
A. Excuse me. I am sorry.

Mr. Paul: Your Honor—

Mr. Packel: Look, Your Honor. Let's not have this kind of action. I specifically said 17 several times.

The Witness: I thought this is where he was pointing to. I am sorry.

"Pursuant to the defendants' plan, City of Philadelphia, Howard R. Leary, James C. Crumlish, Jr., to prevent the sale, distribution and display of the foregoing books and magazines, on or about October 4, 1963, police officers, setting pursuant to the direction—"

Mr. Packel: Pardon me, police officers what?

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The Witness: "—police officers, setting pursuant—"

Mr. Packel: Acting. That is acting.

The Witness: "—acting pursuant to the direction and under the authority of the defendants, City of Philadelphia and Howard R. Leary, Police Commissioner, entered the premises of plaintiff, George A. Rosenbloom and G. & L. Distributors, and pursuant to an illegal warrant for search and seizure, seized the following for purpose of illegal confiscation: 17 cartons containing 1700 Eden Magazines, 288 Naturalist Life, 8 Nude World, 13 Paradise, 1 Sunbather, 1 Naturalist, 1 Eden, 1 Sunshine Health, 157 Hellas Volume 2, No. 10, 287 Hellas Volume 1, No. 5, 5 Hellas Volume 2, No. 9. Following this, the plaintiff—"

Q. That's all I asked you to read. I asked you whether what you read does not appear in this original that is signed by you?

Mr. Packel: And I am showing him, Your Honor, the original complaint from the court record.

A. Yes.

Q. Will you add up the number of—by the way, it also talks about books, doesn't it, not magazines?

This is your own complaint, is it not?

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A. That's right.

Q. It talks about books, doesn't it?

A. That's right.

Q. Will you add up how many books that is and tell us whether it is 1000 or more than 1000?

Do you have pencil and paper to add that up there? I have the number. Isn't it 2,467?

A. I have 2,421, yes.

Q. So it was much more than the 1000 which you just swore to, was it not, more than 1000; is that correct?

A. Yes.

Q. Do you claim you were hurt in any way because these were called books rather than magazines?

A. Yes.

Q. You were hurt because they were called books rather than magazines?

A. Yes.

Q. You were also hurt because the newscasts' references were to the wrong Judge Lord; were you also hurt by that?

A. No.

Q. Were you hurt because they said the bail was $1000 rather than $500?

A. Yes.

Q. How were you hurt on that score?

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A. It made me out to be a much bigger criminal than I was.

Q. Are you a criminal because you are out on bail?

A. No, sir.

Q. Were you hurt because they used the wrong street?

A. Yes.

Q. Why?

A. Because my cousin lives on Vista Street.

Q. So how were you hurt?

A. Because from that date to this he hasn't spoken to me.

Q. By the way, how were you hurt because these were called books rather than periodicals, when you in fact referred to them as books yourself in your complaint?

A. A pocket book, the title of it called The Nudist, which had never been distributed in Philadelphia, I had received the first shipment of it about five or six days before. The Nudist was a paperback book that described the nudist movement, the history of the nudist movement in the United States for the past 30 years.

These were in sealed boxes in my truck. They had never been distributed. These were seized by the police and after I was cleared and tried to distribute this particular book, I couldn't.

Q. When did you start to try to distribute this book, the approximate date?

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A. July, 1964.

Q. So you are saying that these newscasts in the end of '63 had this effect on the sale of those books?

A. I couldn't distribute them. No one would take them.

By The Court:

Q. Well, the fact is that they were books?

A. Yes, this was the only book that Outdoor American Company had ever published. We had prepared this book in the summer of 1963 and they were shipped to me in September, and the reason I hadn't distributed them, sir, was because they had not told me what the wholesale price would be so I didn't know what to charge.

Q. Yes, but I still don't know the answer to Mr. Packel's question as to how you were hurt by the description of what was seized as books rather than periodicals, when you yourself described them as books in your complaint.

A. In our complaint when we mentioned books we meant that was this particular book, The Nudist. This was the title of that book.

Q. I still don't understand how you were hurt by the description of whatever was seized as books rather than periodicals or magazines.

A. Well, the only way I can say it, sir, is that no one would accept it from me afterwards. I was shipped 20 cases,

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100 to a case.

Q. Yes, but the fact is that they were books; isn't that right?

A. This one thing, yes.

The Court: Yes, all right.

By Mr. Packel:

Q. Do you have any personal acquaintance with any of the announcers or employees of WIP?

A. No.

Q. So there is no question of anybody at WIP having any personal grudge or vendetta against you in this case, is there?

A. No.

Q. Other than the one situation that you described when you went to the radio station was there any other attempt that you made to communicate with the station?

A. No.

Q. And as a matter of fact at the time you made that one attempt you were then—there was still pending the suit by you and others against the District Attorney, wasn't there?

A. I believe so.

Q. Yes.

A. The exact date—

Q. You testified it was around October 26?

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A. Yes.

Q. Or thereabouts?

A. Yes.

Q. And the federal case was not over?

A. Oh, no.

Q. In one of the broadcasts if you recall about which you complain there was the statement that—Captain Ferguson's statement that the police may have hit one of the major sources of supply.

You objected to that statement; do you recall that?

A. Yes, sir.

Q. Do you know as a fact whether or not Captain Ferguson said that?

A. I never heard Captain Ferguson say it, no.

Q. But as far as you know he may well have said that; is that correct?

A. He might, yes.

Q. Now, my recollection is that you said that the purpose of your federal suit was to halt raids, is that correct, or did you say it was to halt arrests?

A. I said it was to stop the illegal arrests.

Q. You said its purpose was to stop the illegal arrests?

A. Yes, sir.

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Q. You said that was the only purpose?

A. No, there was three reasons.

Q. There were three reasons?

A. Yes, sir.

Q. Oh, this isn't what you testified to before, however, is it?

A. Yes, it is.

Q. Did you give three reasons originally?

A. Yes, sir.

Q. Will you tell us the three reasons which you say you gave us originally?

A. Yes, sir. One reason was to stop the illegal arrests against me. The second reason was to protect my publisher's right of freedom of the press, and the third reason was—I can't recall exactly what I said.

Q. Is there a third reason?

A. Yes.

Q. What was the third reason?

A. (No response.)

Q. Well, if you just don't remember say you don't remember.

A. Mr. Packel, I am trying to remember exactly what I said.

Q. Yes. Well, I can understand you may not remember. Do you want some more time?

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I want to go on to something else.

A. We can go on and as soon as I remember I will tell you.

Q. All right. Now, you did say, didn't you, in connection with that suit that it had nothing to do with smut; is that correct?

A. That's right.

Q. Are you sure about that?

A. Yes, sir.

Q. There was no references to smut in that suit?

A. The reference to it was to stop the news media from referring to it, yes.

Q. Yes, but they had referred to it as smut, hadn't they?

A. Yes.

Mr. Paul: I am going to object, Your Honor, because references to what anybody else may have said or referred to has no relevancy to this trial.

The Court: Well, this is directed to the question of whether the Federal Court complaint was concerned with smut, I think.

Isn't that correct?

Mr. Packel: That's right, Your Honor, and if I may proceed—

By Mr. Packel:

Q. Will you read to the jury what you said in Paragraph 19?

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I am looking for the original complaint. Do you have it?

Will you please read to the jury what you said in Paragraph 19 of your complaint?

A. "The defendant, Triangle Publications, Inc., through its agents, servants and employees, on or about October 2, 1963 and October 3, 1963, did publish or cause to be published in their daily newspapers, The Philadelphia Inquirer and Philadelphia Daily News, certain stories, pictures and articles referring to the plaintiffs' magazines and books as smut and obscene, in a false and malicious manner, and characterized the plaintiffs as dealers in smut and obscenity."

Q. Yes. Now, will you read Paragraph 20.

A. "The defendant, —"

Q. Now, these are statements that were made by you in your complaint; is that correct?

A. These are statments that were written by my attorney when we filed our suit.

Q. In your behalf?

A. Yes.

Q. Go ahead, read Paragraph 20.

A. "The defendant, The Evening Bulletin, through its agents, servants and employees, on or about October 1, 1963, did publish or cause to be published in their

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daily newspaper, certain stories, pictures and articles referring to the plaintiffs' magazines and books as smut

and obscene, in a false and malicious manner, and characterized the plaintiffs as dealers in smut and obscenity."

And I remember the third thing.

Q. Yes?

A. The third reason we went into federal court was to stop the news media from publishing lies about me.

Q. And those lies being about smut; is that what you are saying?

A. Yes.

Q. But you originally testified that nothing appeared in those proceedings about smut, if my recollection is correct?

The Court: I don't believe that is correct, Mr. Packel.

Mr. Packel: I think it is, Your Honor, but of course this will be for the jury to determine.

The Court: Yes, it will be.

Mr. Packel: Yes.

The Court: But my recollection of the testimony is that he was not seeking in this court to restrain raids on smut. That I think was in answer to my question,

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if I am not mistaken.

Mr. Packel: Well, I thought—of course, the jury will have to remember but my recollection is he made the broad statement that this case in no way dealt with smut.

By Mr. Packel:

Q. Now, I don't think you read Paragraph 21 to the jury.

A. "The defendant, Columbia Broadcasting Systems, Inc., through its agents, servants and employees, on or about October 1, 1963, on the 11:00 o'clock P. M. news program of WCAU-TV, did broadcast and publish a television program referring to the plaintiffs' nudist publications as smut and obscene, in a false and malicious manner, and characterized the plaintiffs as dealers in smut and obscenity."

Q. So that prior to the time with respect to which you claim WIP made any improper broadcasts—by the way, what was the date of the first improper broadcast that you claim WIP made?

Was it not October 4?

A. Yes, sir.

Q. So that prior to that date you had the Columbia Broadcasting System through WCAU-TV, the Evening Bulletin, and the Triangle Publications which publishes the Philadelphia

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Inquirer and Daily News, all those media had said, according to your own statement, that your publications were smut and obscene; is that correct?

A. On October 1, yes.

Q. On October 1, and also on October 2 and 3, as far as the Philadelphia Inquirer and Daily News are concerned, isn't that correct, according to Paragraph 19?

A. Yes, sir.

Q. You said yes, sir?

A. Yes, sir.

Q. Now, again I am going by my memory but my recollection is that you said in your direct testimony that in that case you made no claim for damages; didn't you so testify?

A. I never said that.

Q. You did not so testify, or you don't remember?
A. I didn't say that.
Q. You did not say that?
A. No, sir.

The Court: May I see this complaint? Thank you. Is this the entire file?

The Clerk: No, Your Honor.

The Court: Are you through with this file, Mr. Packel, for the moment?

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Mr. Packel: Not quite, Your Honor.

The Court: Do you want it now?

Mr. Packel: No, not immediately.

By Mr. Packel:

Q. Apparently we are not sure just what you did say before so I will not proceed with that, but in any event did you make a claim for damages in this case?
A. Yes, sir.
Q. You did make a claim?
A. Yes, sir.
Q. That was against the Bulletin, Daily News and Inquirer?
A. No, sir. That was against the City of Philadelphia.
Q. You didn't make a claim for damages against the Bulletin, Inquirer, and so forth?
A. In that particular suit?
Q. Yes.
A. No.
Q. You did not?
A. No.

Q. Will you please read to the jury Paragraph 24 of that complaint?

Mr. Packel: I guess His Honor has the complaint.

The Court: Just a moment. Here you are.

By Mr. Packel:

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Q. Will you read to the jury Paragraph 24?

A. "As a result of the action of the Evening Bulletin, Triangle Publications, Inc., Columbia Broadcasting Systems, Inc., aforesaid, the plaintiffs have been and are greatly injured in their good name, credit and reputation, all of which have been and will be to their great financial loss and damage."

Q. So you did say that, that the Evening Bulletin and the others did cause you damage, didn't you?

A. Mr. Packel—

Q. Please answer yes or no, then you can qualify if you want to.

A. Yes.

Q. Now, as a matter of fact, didn't you even ask for damages against all of the defendants on page 11 of the complaint where you asked for the court to enter a judgment against the defendants and of course the Bulletin, Inquirer and Daily News and so forth were defendants, were they not?

Were they not?

A. Yes. Can I—

Q. Did you not ask for the Court to enter a judgment against the defendants in favor of the plaintiff for damages sustained? Didn't you ask for that?

A. Yes, and I would like to qualify it again.

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Q. Sure, you may.

A. Sure. No. 1, I did not draw up these papers. My attorney did. No. 2, my understanding of this was that we had filed a suit against the City for damages for my illegal arrest, and we had asked to restrain the news media from publishing any further lies about me.

Now, that's all I can tell you.

Q. Had you read this before you signed the oath to the complaint? Had you read it?

A. I read this but I am not no attorney.

Q. And when you read it, this is back how many years? The date of your oath was October 14, or 19?

A. 14th, because—

Q. October 14, 1963?

A. Yes, sir.

Q. You read it then and yet today you say you don't understand that that was what it was supposed to be; is that correct?

A. Yes, sir. All I can tell you, sir, is that I am not an attorney and I sign what my attorney tells me to.

Q. I wish you would have been an attorney.

The Court: Let me see it again, will you, please? Go ahead, Mr. Packel.

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Mr. Packel: Will Your Honor indulge us for a few moments?

No further questions.

Mr. Paul: May I see that, please? May I see the original complaint, Your Honor?

The Court: Oh, yes, sure.

RE-DIRECT EXAMINATION

• • •

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(Copy of complaint in equity, Outdoor American Corporation and G. & L. Distributors and George A. Rosenbloom vs. City of Philadelphia, Howard R. Leary, James C. Crumlish, Jr., and The Evening Bulletin and Triangle Publications, Inc., and Columbia Broadcasting Systems, Inc., Civil Action No. 34316, marked Plaintiff's Exhibit No. 22 for identification.)

By Mr. Paul:

Q. Mr. Rosenbloom, in regard to the depositions in the other case that Mr. Packel asked you about, did you have any difficulty with the stenographer after those depositions were transcribed?

A. Yes, sir.

Q. Would you tell the jury what the difficulty was?

A. When—

Mr. Packel: Your Honor, may I object at this time? He has already testified to this difficulty and we ac-

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tually have what he said in his own complaint which deals with the subject matter of what was seized, so I don't see the appropriateness of this redirect examination.

The Court: Overruled.

A. When you showed me the copy of those notes of testimony there I pointed out to you quite a number of mistakes in it. They even had my name wrong, and we tried on numerous occasions to have a meeting with the court

stenographer to get the errors corrected, but to this date we have never been able to do that, and I would like to say one thing here, that this figure represents magazines that were taken from my home and from my barn on October 4, and also some magazines taken from my truck on October 1.

Q. Mr. Rosenbloom, besides your barn and your home did you have magazines on the newsstands in the City of Philadelphia?

A. Yes.

Q. Were any of those confiscated?

A. Some were, some were not.

Q. Do you know the exact amount of what was taken from the newsstands?

A. No.

Q. Do you know where that figure that you mentioned to Mr. Packel that he took out of the complaint came from? [298]

A. At this point, no.

Q. Did you have records of all the material that was taken from you including your home, your barn, and what was on the street and what was in your truck?

A. I never had a record of what was taken from me on the street, no, and I don't have any records today of what was taken from me.

Q. When you say 1000 magazines, where were they allegedly taken from?

A. 10 cases of Eden were taken from the barn and that's all, because that's all that was there.

Q. Did more than 10, more than a figure which those 10 cases represent show up in the hands of the police?

A. Yes.

Q. And you don't know where they got the other magazines from, do you?

A. No.

Q. Incidentally, did you ever get any of your magazines back?

Mr. Packel: I will object, Your Honor.

The Court: Sustained. No, overruled. I think that might have some pertinence.

By Mr. Paul:

Q. Did you ever get any of your magazines back from the

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police? Let me qualify that.

A. Yes, I got all my magazines back from the police.

Q. And how many back did they give you?

A. I would have to say about—I am just guessing at this point, between 4000 and 5000 books and magazines covering the two arrests.

Q. Now, did you ever have that amount, those figures that represent that quantity, did you ever have them at any one time in your house and in your barn prior to October 4?

A. No, because when I would receive a new shipment, in —within four or five days I would distribute them, so at no time would they all be in the barn and in the house.

What I would do, I would make a distribution and then those that were left over I would place in the barn.

Mr. Paul: No further questions.

RE-CROSS EXAMINATION

By Mr. Packel:

Q. Are you still trying to say that the only amount seized in the barn was 1000?

A. Yes, sir.

Q. Notwithstanding this statement under oath in which you itemized each one of the items that were taken?

A. Yes, sir. Those are an accumulation of the two arrests,

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the magazines that were taken on Tuesday, October 1, and Friday, October 4.

Q. You mean those were taken from your home and from the barn?

A. From my home, from my—the barn and from my truck.

Q. How many were taken from your truck?

A. There were 20—it would be very difficult at this time to itemize everything taken from the truck.

Q. I am not asking you to itemize them, I am asking you approximately how many were taken from the truck.

A. I had approximately seven cases of Eden, I had one case of the small magazines, the Hellas, and the Naturist Life; one box would hold about 800 of them, and they took the paperback book, The Nudist, and that's about it.

Q. Well, now, I am not sure that I follow you. Now about how many publications were taken from your truck?

A. From the truck on October 1, approximately 3000.

Q. Approximately 3000?

A. Yes.

Q. Then the reference that is in Paragraph 17, and if you will read it to make sure as to what was taken from your premises—I assume that is the house and the barn; is that correct?

A. I don't know.

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Q. Do you want to look at 17 and see whether it doesn't say, "—entered the premises of plaintiff,—"

That is the seventh line.

Mr. Packel: He doesn't have it before him.

The Court: Show him your copy.

By Mr. Packel:

Q. Doesn't that say at about the seventh line that they entered your premises and took these?

A. Yes, it says premises.

Q. And this is not referring to what was taken from the truck because you yourself said that from the truck was taken over 3000; is that correct?

I mean on the witness stand you have just said that from the truck there was taken, unless I misunderstood you, you said that there were over 3000 taken from your truck?

A. This says premises. It doesn't say my home, it doesn't say my barn, it doesn't say my truck.

Q. But it is not referring to your truck, is it?

A. It could be, yes.

Q. You just testified that from your truck alone they took over 3000 books?

A. That's right.

Q. And here this total is some 2400, so that this isn't

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referring to what was taken from the truck, is it?

A. I don't know.

By the Court:

Q. When were they taken from your truck?

A. On Tuesday morning, October 1, sir, the first arrest. My truck was parked on Market Street between 15th and 16th.

Q. Yes, all right. Was that the only time that they took anything from your truck?

A. Yes, sir.

Q. On October 1?

A. Yes, sir.

The Court: Well, do you have that copy of the complaint there, Mr. Packel?

Mr. Packel: Yes, I do, Your Honor.

The Court: Will you show it to the witness?

By the Court:

Q. Now, will you look at Paragraph 16 of that complaint? Do you have that?

A. Yes, sir.

Q. Now, that refers to the seizure of October 1, 1963, does it not?

A. Yes.

Q. And that was the truck?

A. Yes.

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Q. Is that correct?

A. Yes.

Q. And the next paragraph, 17, refers to October 4, 1963, does it not?

A. Yes.

Q. And that wasn't the truck?

A. According to this, yes.

The Court: All right.

Mr. Packel: That is the only point I wanted to make, Your Honor, so I am through.

Mr. Paul: Thank you, Mr. Rosenbloom.

The Court: That's all.

Mr. Paul: Thank you.

(Witness excused.)

Mr. Paul: Your Honor, I am calling the Clerk of the Quarter Sessions Court of the County of Philadelphia to the stand.

Mr. Packel: May we see Your Honor at side bar about this?

The Court: Yes.

(Discussion at side bar off the record.)

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(The following discussion at side bar:)

Mr. Packel: If the Court please, I object to the testimony which counsel for the plaintiff says goes to the question of the determination by the Pennsylvania Common Pleas Court on the charge of obscenity.

It is my position that this, which transpired many, many months after the issues which are before the Court, have no pertinency to this proceeding. The determination by the judge in that case, whether it was stated by him to be as a matter of law or a mixed question of fact and law, I suggest to Your Honor is a matter which is not in any way binding on us nor is it relevant evidence.

It is in my view the usual situation in which the fact that a determination is made in favor of a defendant in a criminal case is not evidence in a civil case pertaining to the basic issue.

The Court: I will overrule the objection.

Mr. Packel: I have an exception.

(End of discussion at side bar.)

REGINALD S. LIPSCOMB, sworn.

DIRECT EXAMINATION

By Mr. Paul:

Q. What is your occupation, sir?

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A. My occupation is an assistant clerk in the Court of Quarter Sessions.

Q. In Philadelphia County?

A. County of Philadelphia.

Q. And at my request you have brought the proceedings there with—concerning George A. Rosenbloom?

A. That is correct.

Q. And your file is marked by court term and number, is it not?

A. Right.

Q. What is the court term and number of those proceedings?

A. December, '63, No. 1231 and 1232.

Q. In those records you have the indictment of that which George Rosenbloom was charged with, and the disposition by the judge, do you not?

A. Yes, I do.

Q. And also as part of those proceedings you have Judge Ullman's opinion?

A. The notes of testimony.

Q. The notes of testimony?

A. Yes, sir, I do.

Q. And are those—

Mr. Paul: I am wondering whether Mr. Packel will stipulate that they are kept in the ordinary course of business?

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Mr. Packel: I have no objection with respect to their authenticity, Your Honor, or if they—if he says they are the court records I have no objection to anything further, any further proof with respect to that.

Mr. Paul: Thank you. May I have those court records marked as an exhibit?

The Court: Yes.

The Witness: These are our original records.

Mr. Paul: If Your Honor please, as an aid to the Quarter Sessions Court of Philadelphia County, as I have attempted to aid the Federal District Court, in having the judge's opinion marked may I have my copy of the judge's opinion marked?

The Court: Yes.

Mr. Paul: I will show it to Mr. Packel.

Mr. Packel: May I look at these, Your Honor?

The Court: Sure.

Mr. Paul: Will you mark this, please?

(Photostatic copy of the notes of testimony in the matter of Commonwealth vs. George Rosenbloom, December Sessions, 1963, No. 1231 and No. 1232, in the Court of Oyer & Terminer, General Jail Delivery and Quarter Sessions of the Peace for the County of Philadelphia, dated May 8, 1964, marked Plaintiff's Exhibit No. 23 for identification.)

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The Court: May I see that?

Mr. Packel: I have looked at them.

Mr. Paul: If Your Honor please, I have one additional question to ask this witness. I am going to ask him to read into the record what the Court said.

Mr. Packel: I will object to that.

The Court: I will sustain the objection.

Mr. Paul: Well, I would request at this time that the exhibit which is marked P-23 be introduced into evidence.

Mr. Packel: I will object, Your Honor.

The Court: No, I think I will exclude that, but having read P—or having read the portion of P-23 which contains what the judge said to the jury, I will put into the record that he held that these magazines were not obscene as a matter of Pennsylvania law.

Mr. Packel: Of course, Your Honor, I have an exception.

The Court: Yes.

Mr. Packel: Specifically for the reasons already given Your Honor.

Mr. Paul: Cross-examine.

Mr. Packel: I have no questions but I want to make sure that the full record, although not marked, is

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kept in court so I have an opportunity to look at it.

The Witness: Yes, you will have an opportunity to look at it at any time.

Mr. Packel: So long as I have an opportunity to look at it.

The Court: Will you leave that here, that record?

The Witness: This is our only record, the original record that we have.

The Court: Yes. It will be returned.

The Witness: It will be returned?

The Court: Oh, yes. Of course it will be returned.

The Witness: That will be all, Your Honor?

The Court: Yes, that's all, just leave the record and I suggest that either one of you attorneys give Mr. Lipscomb a receipt for that record.

Mr. Paul: Mr. Packel would like to see it so Mr. Packel can give him the receipt.

Mr. Packel: Except that you subpoenaed it and I think they will look to you for responsibility.

The Court: That's right.

Mr. Paul: I think, Your Honor, Mr. Packel will just want to look at it and maybe return it today, so

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if the Court Clerk will stay in court with the record—

Mr. Packel: I may have to refer to it for the jury tomorrow, Your Honor. I can't tell yet without looking at it, so I don't see that it will go back yet today necessarily.

The Court: All right.

Mr. Packel: Just to make sure, I assume it is in the record, but does what you read have the date as to when the judge said that?

Can we have that stated for the record?

The Court: I am sure it does. I didn't notice the date on it but if you will give me that P-23—let's see. It looks to me as if it was May 11, 1964.

Mr. Packel: Is that correct, as far as you understand, Mr. Paul?

Mr. Paul: May 8—excuse me.

The Court: That is when the trial started. It was over the weekend and the ruling was made on Monday, May 11, 1964.

Mr. Paul: Yes, sir. In the meantime, while the clerk is initialling it, I call Mr. Chuse to the stand, Mr. Daniel Chuse.

(Witness excused.)

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The Court: I think I will see counsel again at side bar, please. As a matter of fact, the jury can take a recess now.

(Jury excused.)

(The following discussion at side bar:)

The Court: I have been giving further consideration to this witness' testimony. While certainly Mr. Packel was aware of what this witness would testify to I think that he was also entitled to be advised that this was one of the things that you were relying on for the libel, or the defamation, and nowhere in the deposition does that appear.

It only appears that this is what he told Mr. Rosenbloom.

I think if you were going to rely on that as a basis for your defamation that your interrogatories should have been amended to bring that up to date.

Also, I am not even sure that that is libelous; that is just one man's idea of what ought to be done, and I am not at all sure that that is libelous in that sense, so I am going to adhere now to my original ruling and exclude that testimony.

Mr. Paul: Well, may I say, Your Honor, that

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we don't offer it to show that what he heard was libelous: we rely for the libelous statement on what we informed Mr. Packel we relied on which was the outward malice toward the defendant, not the libelous statements. The libelous statements are contained in the written material we gave to Mr. Packel.

The Court: I hadn't thought of that. The malice—I hadn't thought of that, frankly.

Mr. Packel: If an opinion as to someone—what he thinks should be done because so-and-so has an indication of malice, I can't see that, Your Honor.

The Court: I think maybe it is.

Mr. Packel: Malice—there is no knowledge. You have the testimony that there was no knowledge. No one knew him or anything of that sort, so it is not that somebody was trying to use the radio as a medium for some kind of personal vendetta. That is in the record already, and I can't see that as evidence of malice, to say that someone who is charged with smut, and I would assume, and if convicted, ought to be put in jail.

The Court: He didn't say if convicted according to the testimony.

Mr. Packel: He obviously means that. If it is not true that he was selling improper stuff, then there

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is—you obviously don't want to put him in jail.

The only inference that can be drawn from that is not an inference of malice but an inference that if there is guilt this is what ought to be done.

The Court: All right, I think I have your argument. I am inclining now the other way but I will think about it and rule on it after recess.

Mr. Paul: On the question of malice, Your Honor is familiar with the fact that aiming a shotgun in a crowd—it doesn't have to be directed at one particular person.

The Court: Yes, I am.

Mr. Packel: Is there more than one witness as to this?

Mr. Paul: No, just this one witness will be sufficient.

Mr. Packel: I just wanted to make sure that any other witnesses would be excluded from the room.

The Court: Yes.

(End of discussion at side bar.)

(Short recess.)

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Mr. Paul: Mr. Chuse.

DANIEL CHUSE, sworn.

DIRECT EXAMINATION

By Mr. Paul:

Q. Where do you live, Mr. Chuse?

A. Well, right now I live 8612 Frontenac Street.

Q. And do you know the defendant—excuse me, the plaintiff, George Rosenbloom?

A. Yes, I do.

Q. And did you ever have any occasion to hear anything concerning George Rosenbloom over the radio?

A. Yes, I did.

Q. What radio station was that?

A. It was WIP.

Q. And do you remember when that was?

A. The exact date, no.

Q. Do you remember the approximate date?

A. Well, from the testimony I heard here today I know the exact date but before I came into court I didn't—

Mr. Packel: Well, Your Honor—

By Mr. Paul:

Q. Did you know the approximate date before you came into court?

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A. Well, it was in the fall of 1963; that's all I could say.

Q. All right. Now, would you tell the jury what you heard?

Mr. Packel: Now, this is again when?

By Mr. Packel:

Q. The fall of '63?

A. In the fall of '63.

This is going back almost five years. I don't quite recall exactly what was said but I did hear over WIP one

of the announcers stating something like this, that they raided—

Mr. Packel: I will object to "something like this." Of course I can understand why he can't give the exact language but I do want him to state what he did hear.

By The Court:

Q. That's right, your best recollection of what you heard.

A. My best recollection is that they didn't give the name, I don't think. They arrested a man and the announcer said that the best thing they could do—it had to do with obscene literature and magazines and the best thing they should do with a man like that is put him in jail and throw away the key.

By Mr. Paul:

Q. Now, when—did you ever ascertain who they were talking about?

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A. No, I—

Mr. Packel: He has already testified that he didn't know.

The Court: No, he didn't.

Mr. Paul: He didn't say that.

The Court: No.

Mr. Packel: I thought he said there was no reference to the name.

The Court: That is what he said now, yes, but the question is did he ever ascertain who it was.

Mr. Packel: Oh, subsequently?

The Court: Well, I don't know.

By Mr. Paul:

Q. Did you, sir?

A. Can you repeat that?

Q. Did you ever ascertain who they were talking about?

A. When the—I heard the broadcast, no.

Q. No, but did you ever ascertain who they were talking about?

A. Not when I heard the broadcast.

Q. I am not talking about that time; afterwards.

A. Oh, after the broadcast, yes.

Q. Would you tell us who you ascertained they were talking about?

The Court: No, first let's know how he

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ascertained it.

Mr. Paul: That was my second question, but I will reverse them to meet the Court's inquiry.

By Mr. Paul:

Q. Tell us the circumstances and how you ascertained who they were talking about.

A. At the particular time I owned a restaurant on Castor Avenue and Mr. Rosenbloom was a frequent customer of mine.

I don't remember how the conversation started but I think I started it with—I asked him if he knew the particular person who is distributing—in the magazine business, and he happened to say that it was him that I heard over the radio.

That is how I think this all came about.

Q. Did you make any other comments to Mr. Rosenbloom?

A. It was just my own personal opinion.

Q. All right, did you notice anything about Mr. Rosenbloom after—his emotional state after you told him this?

A. I know he was affected by it. I mean it was he spoke to me about it.

Q. How would you say he was affected?

A. Well, I think he was I think ashamed, to put it in words, like that.

Mr. Paul: All right, cross-examine.

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CROSS-EXAMINATION

By Mr. Packel:

Q. Are you related to the plaintiff?

A. I am not.

Q. Are you related to the plaintiff or his wife?

A. No.

Q. How long have you known him?

A. I think he first came into my store around 1960.

Q. 1960?

A. 1960, yes.

Q. 1960. When you heard this broadcast was anybody with you?

A. No, I was driving my car by myself.

Q. You were driving your car by yourself?

A. In my car, right.

Q. So this may well have been approximately 6:00, 6:30; is that it?

A. I cannot recall the exact time. I will not state it.

Q. When is the last time you talked to somebody about this?

A. The last time I spoke to somebody about this?

Q. Yes.

A. I don't think I spoke to anybody about this particular case.

Q. You have spoken to nobody about this?

A. What do you mean, did I speak to Mr. Rosenbloom, his attorney?

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Q. Yes, when was the last time you spoke to anyone about this?

A. The only time I spoke to his attorney is when he called me up on the phone.

Q. And when was that?

A. It was last Saturday—it was last Saturday, he came into the place where I work and he left a message and I called him back on the phone.

Q. So that the last time that you had discussed this was this Saturday that you mentioned?

A. Yes.

Q. Now, prior to that, when was the last time you discussed it?

A. The only other time was when Mr. Rosenbloom happened to come into the place where I am working now presently.

Q. When was that?

A. It was before last Saturday, I know that. The date I don't remember.

Q. Approximately when?

A. Tuesday, Wednesday. I am not sure.

Q. Several days—

A. Before Saturday, right.

Q. That's right. Now, so that you talked to the lawyer a little over a week or so ago; you talked to Mr. Rosenbloom a couple days ahead of that?

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A. Right.

Q. When prior to that did you ever discuss this with anyone?

A. With Mr. Rosenbloom?

Q. With anybody.

A. I never spoke to anybody about this.

Q. You never spoke to anybody about this prior to these last two times?

A. I saw Mr. Rosenbloom in the course of say the last four to five years a couple of times, but that's about it.

Q. But you haven't spoken about this?

A. No, I didn't know there was a court case.

Q. So that from the time in the fall of '63 that you are talking about until a couple weeks ago you never discussed this with anybody?

A. No.

Q. And yet you remember what was said over this broadcast?

A. Yes, I do.

Q. What do you have, a pushbutton on your car for a radio?

A. At that particular time I had a 1962 Fairlane and it was a radio without a pushbutton.

Q. As a matter of fact, tell me if you know, weren't there statements over various radio stations about the arrest of this distributor?

Mr. Paul: Objection, Your Honor. That is

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without foundation.

The Court: Overruled.

A. Well, I never listened to any other station but WIP.

Q. You only listen to WIP?

A. That's right. I happen to like the station.

Q. And you never listened to any other station?

A. In my car, no.

Q. At home do you listen to another station?

A. I don't listen to the radio at home, I watch television.

Q. The only station you listen to on the radio is WIP?

A. That's right.

Q. And you are sure on this particular night you were listening to WIP?

A. Yes.

Q. You are also sure that there was no mention of any name at that time; is that correct?

A. That I don't recall. It could have been a name, it could not have been a name.

All I remember is those last few words, what I think were—I better not say anything—I just happened to hear it, and that's it.

Q. Do you know that there were broadcasts about two different alleged obscene matters on that particular day?

Mr. Paul: Objection, Your Honor. That is

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without foundation also.

The Court: No.

Mr. Packel: I am asking if he knows it.

By Mr. Packel:

Q. Do you know that there were references in the same broadcast to two different obscene matters? Do you remember that?

A. That I can't recall.

Q. So that what you heard about throwing away the key may have applied, if there were two matters, may have applied to either one; is that correct?

A. If you say so, because of course—

Q. You don't know whether this was in reference to the first obscene matter that was talked about or the second, if there were two?

A. If there were two I wouldn't know.

Q. And you would not know to which one the reference was made about throwing the key away?

A. No, I wouldn't.

Q. What is your occupation, by the way?

A. Right now I work as a sandwich man in a delicatessen restaurant.

Q. And your occupation used to be, as I understand, you had a dinette called Danny's Inferno?

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A. Dante's Inferno.

Q. Dante's Inferno. Do you have the same automobile you used to have?

A. No.

Q. And you still only listen to WIP?

A. I still listen to WIP.

Q. Only WIP?

A. Only WIP.

Q. On your automobile radio?

A. On the radio.

Mr. Packel: That is a tribute to our station. No more questions.

RE-DIRECT EXAMINATION

By Mr. Paul:

Q. Sir, this broadcast that you heard, did it talk about distributors?

The Court: About what?

By Mr. Paul:

Q. A distributor.

A. I don't recall it.

Q. Was there anything peculiar out of the words you just said that you can think of now that was contained in the broadcast?

Mr. Packel: I will object, Your Honor.

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The Court: Sustained.

By Mr. Paul:

Q. At the time you talked to Mr. Rosenbloom did you ascertain what kind of business he was in?

Mr. Packel: I will object, Your Honor. I don't see where this is redirect.

The Court: No, overruled, but which time are you referring to?

Mr. Paul: When he—at the time he indicated that he thought it was Mr. Rosenbloom they were talking about, the subsequent date.

Mr. Packel: He hasn't said that.

The Court: He hasn't said that.

Mr. Packel: That he thought it was Mr. Rosenbloom.

Mr. Paul: The subsequent date when he had a conversation with Mr. Rosenbloom.

The Court: He had several conversations with Mr. Rosenbloom.

Mr. Paul: He talked about one particular date in the fall of 1963 as when he heard the broadcast.

By Mr. Paul:

Q. After the fall of 1963 you testified you talked to Mr. Rosenbloom concerning that broadcast in the fall of 1963,

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did you not?

A. Yes.

Q. Now, during that conversation did you ascertain what type of business Mr. Rosenbloom had been in?

A. Well, I think I knew that he was in the magazine distribution business. That's all I knew.

I didn't know of what kind of magazines or anything like that.

Q. Well, what brought the conversation up about the radio broadcast?

A. Because I think I asked him if he knew the particular fellow they were talking about who was arrested and he happened to say that it was him.

Mr. Paul: All right, no further questions.

The Court: That's all, thank you.

(Witness excused.)

(Counsel confer off the record.)

Mr. Paul: Your Honor, we can stipulate that the life expectancy of a male human being in the United States is at least 65 years old, and if Your Honor please, at this time I would offer into evidence all the exhibits that we have had marked. I think Your Honor has made a ruling on the last one.

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The Court: Yes.

Mr. Packel: May we see you at side bar, Your Honor?

The Court: All right.

(Discussion off the record at side bar.)

(The following discussion at side bar:)

The Court: The plaintiff has offered all of the scripts that were read to the jury, being P-1 through P-21 into evidence.

The defendant objects to their being received into evidence and going out to the jury.

Mr. Paul: May I say Your Honor has discretion in allowing what may go out with the jury in their deliberations.

I ask Your Honor to allow the exhibits into evidence and then use your discretion so that I may properly refer to them in the course of my summation. If Your Honor chooses not to let the scripts go out with the jury, I think that is another matter.

The Court: Yes, I think I will admit them but with that limitation, that I will not permit them to go out with the jury.

Mr. Packel: Then I have no objection.

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(Plaintiff's Exhibits Nos. 1 through 21 received in evidence.)

The Court: And P-22 is the complaint, that is the copy, in Civil Action 34316, which is the Federal Court injunction action.

I will admit that.

(Plaintiff's Exhibit No. 22 received in evidence.)

Mr. Packel: I haven't offered that. He had it marked and he is offering it.

I have no objection to it.

Mr. Paul: Yes, sir.

The Court: P-23 I have admitted, but not physically.
(Plaintiff's Exhibit No. 23 received in evidence.)

Mr. Paul: Thank you, sir.
(End of discussion at side bar.)

Mr. Paul: For my last witness, sir, I will recall Mr. Rust.

PAUL RUST, recalled.

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DIRECT EXAMINATION

By Mr. Paul:

Q. Now, Mr. Rust, do you know the financial worth of Metromedia, Inc.?

A. The approximate overall worth for 1967—

Mr. Packel: Just answer yes or no.

The Witness: Yes.

By Mr. Paul:

Q. What was it, sir, for 1967?

Mr. Packel: Objection, Your Honor.

The Court: Overruled.

Mr. Packel: May I state my reason for the objection?

The Court: Yes.

Mr. Packel: It is that the record does not bear on any question of such type of damages as would warrant this kind of testimony.

By Mr. Paul:

Q. Your answer, sir?

A. Approximately $100 million.

Mr. Paul: Thank you, sir.
No further questions.

Mr. Packel: No questions.

(Witness excused.)

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Mr. Paul: If Your Honor please, that is the plaintiff's case.

Mr. Packel: May we see Your Honor at side bar?

The Court: Yes.

(The following discussion at side bar:)

Mr. Packel: I move for a directed verdict, Your Honor, on the basis that no common law action has been stated because there is no showing of any abuse of the privilege with respect to the reporting of an important, newsworthy matter, with respect to the two types of lawsuits that were involved.

Aside from the common law bases for my position that there is no cause of action here, I ask Your Honor to rule that under the Supreme Court of the United States decisions that there has not been shown such a gross neglect, if any neglect at all, with respect to reporting this matter of great current importance, and that in the absence of malice or gross failure to exercise due care with respect to this type of public matter there is no cause of action.

I want to emphasize that certainly the matter of someone being arrested, which has been already carried

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in three newspapers and other radio stations is a matter of great public interest, which warrants comment by a news media.

We have no evidence of any gross neglect in this case.

Assuming that the jury were to take the view that this language meant that this man had been selling girlie magazines, there is not such a lack of due care involved. This is not a case where if some check had been made, either of a Supreme Court decision or of anything else, it could have been known that these were not obscene. After all, there had been already a great deal of public outcry with respect to these being obscene. Now, we may well have been mistaken in that judgment in repeating what others have said, but it is not a gross abuse.

What could we have turned to to make this determination, whether they are obscene? Fair comment includes a right to say something about the public issue.

The reason for the constitutional privilege is that there should be healthy argument and contentions made about public issues. Now if this were a matter where we could have checked with someone else and had

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been told that it was definitely wrong to say that these are such-and-such, that would be another matter.

That, for example, happened in the Supreme Court case involving the athletic director where there was no check and there was clearly shown that checks could have been made, so it could have been determined that this was an outright crime.

In this case all we had was that many, many months later a court said that these weren't obscene, but cer-

tainly it couldn't have been known by WIP at the time of these broadcasts that these were not obscene, and whatever check we would have made, I am just about finished now, I say that whatever check we would have made—we couldn't have gone to somebody and say is this obscene, or is this not obscene?

It is not that we are making statements which we could have gone to someone and found out that those statements were incorrect.

Now, in the Butts case there was an ability to go and to check with people and to make a determination that these things were actually false things.

Now, when we characterized this as being smut, this is a privilege to assert with respect to a public issue, and it is not a case in which we could

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easily or in any other way really learn.

Now, in the Butts case the final language in the Supreme Court of the United States was, as I recall, that under the circumstances in this case there was a gross failure to check the thing out and if they had checked it out they wouldn't have made this extreme error.

Now, what could we have done in this case? If we wanted to characterize this as smut, as was done by three newspapers and another radio station, in checking all around there was still no ability to say that we were wrong in calling this smut, as was true in the Butts case, and essentially for those two reasons, the common law reason and the constitutional law reason, I think that a directed verdict should be entered here.

The Court: All right, I will deny your motion.

Now, are you going to put on any evidence?

Mr. Packel: Yes.

The Court: You do have evidence?

Mr. Packel: Yes, I have some evidence, not too much, but Captain Ferguson and also probably I will put Rust on, and something else.

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MORNING SESSION

The Court: Good morning. All right, Mr. Packel.
Mr. Packel: Captain Ferguson, please.

CAPTAIN CLARENCE FERGUSON, sworn.

Mr. Paul: If Your Honor please, may I request an offer of proof at side bar, to save time and objections?

The Court: All right.

(The following discussion at side bar:)

Mr. Packel: If Your Honor please, we propose to show by Captain Ferguson the truth of various assertions that appeared in the broadcasts.
It is as simple as that.

Mr. Paul: I have no objection to the statements made, to Captain Ferguson testifying to the statements made that there was an arrest, but I think, Your Honor, I would request that Your Honor caution Mr. Packel not to get into the realm of Captain Ferguson's conclusions, as to what is obscene.

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The Court: That's right.

Mr. Packel: I plan to go into that, Your Honor, just as the plaintiff testified he didn't consider it obscene.

I think we have got the right to show that it was obscene.

The Court: I don't think you do, not when you have a State Court determination.

Mr. Packel: You are making such a horrible mistake on that.

The Court: I don't agree with you, Mr. Packel.

Mr. Packel: Your Honor, let me point this out to you, that State Court—first of all, the rule about following State Courts does not apply to a single Common Pleas decision; that is first of all.

Erie Railroad versus Tompkins deals with principles of law announced by a court of appellate jurisdiction.

The Court: No, you are wrong about that.

Mr. Packel: I do not—

The Court: Just a minute. You are wrong about that. I am bound to follow State law.

Now, if the only determination is a Common Pleas decision, then that is the state law that I am bound to

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follow.

Mr. Packel: If there is more than one, my recollection is—

The Court: of course—

Mr. Packel: But more important than that, this determination by this judge was made on the basis of evidence that he heard as to nudism and so forth.

Now, he has pointed out in the very opinion, he pointed out that that criminal case has to be proved beyond a reasonable doubt.

Now, when he makes the determination that this was not obscene under Pennsylvania law, under these facts, he is basing it on the fact that the jury could not have held within reasonable doubt that this was obscene.

I can point to that, where he talks about it, that it is beyond a reasonable doubt, so to say that you are bound to conclude that this is not obscene in this case because—I am sure Your Honor is making a reversible error.

The Court: All right, I have been reversed before.

Mr. Packel: I think we ought to avoid that.

The Court: I would like to, sure.

Mr. Packel: Do you think, as I understand it, that
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because in a case where there is evidence submitted and after all, the evidence is submitted as to the origin of this magazine, as to what the evidence in that case said, as to—

The Court: I am not going to get into an argument on that at this time.

You go ahead and present your proof and we will rule on it as it goes in.

(End of discussion at side bar.)

DIRECT EXAMINATION

By Mr. Packel:

Q. Captain Ferguson, you are on the police force; is that correct?

A. Philadelphia Police, yes, sir.

Q. How long have you been on the Philadelpia Police Force?

A. 48 years.

Q. And how long have you been Captain on the Police Force?

A. 1955 I was made Captain.

Q. And you are still Captain?

A. Yes, sir.

Q. In the course of your work did you have to concern yourself with matters of smut or obscene periodicals?

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Mr. Paul: Objection, Your Honor.

The Court: Overruled.

A. Yes, I have. I was engaged in that, in investigations and arrests on smut and obscene periodicals.

Q. Over how long a period has that been part of your function?

A. Oh, the last 40 years that has taken place.

Q. In the course of your duties do you recall an incident involving George Rosenbloom?

A. Yes, sir.

Q. Involving Mr. Rosenbloom that is in the courtroom here?

A. I do, yes, sir.

Q. Do you recall whether or not you talked to any news media about that matter?

A. Several, I did.

Q. And did you talk to any people at WIP concerning the matter?

A. I talked to WIP Station and gave the news of the smut raid and the obscene book raid and the sale of the books on the newstands, the different newsmen we arrested on the sale of obscene literature, and obscene books, and I talked to WIBG, I talked to the United Press wire, and gave them the story.

Q. Do you recall whether you told them the nature of the

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material received?

A. I did. I told them.

Q. What did you tell them about the nature of the material?

A. I told them—

Mr. Paul: I object, Your Honor. He said—I am not sure the question is properly confined to what he told WIP. I didn't understand—

The Court: Yes, it should be confined.

Mr. Packel: I thought I had, Your Honor. I thought I had.

By Mr. Packel:

Q. Will you tell us what you told WIP about the nature of the material?

A. I called WIP by telephone and advised them of the large raid we were conducting and the amount of books that was confiscated from Mr. Rosenbloom in a truck at 15th and Market Street where he was serving the different newsmen through the center of the city, so I gave WIBG the same information.

The Court: Well, Captain, we are only interested in this case in WIP.

By Mr. Packel:

Q. Now, did you tell the people at WIP what you considered the nature of the material?

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A. Yes, I told them—I told them—

Mr. Paul: Objection, Your Honor.

The Court: Overruled.

A. (Continuing) I told them it was very obscene, the books and the literature we confiscated.

Q. And did you tell them why? Did you say why it was obscene?

A. Well, it showed the—

Mr. Paul: I would object, Your Honor. It is not responsive. His answer is not responsive.

The Court: He hasn't answered yet.

A. (Continuing) I told WIP it was very obscene and the raid was a large raid, one of the largest raids in the City of Philadelphia.

I think we arrested 20 or 22 people that day, newsmen around the different newsstands that was selling this book to the public. Some of the places were near schools.

Mr. Paul: Now, Your Honor, I ask that that be stricken. I object.

The Court: Yes, motion granted.

By Mr. Packel:

Q. Did you say anything to WIP as to where these materials were being sold?

A. I told them the different newsstands and the different

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persons that were arrested that day and told them of Mr. Rosenbloom being seized at 15th and Market with a truckload of these books.

That was on October 1st, 1963.

Q. One of the broadcasts that are at issue in this case, Captain Ferguson, was a statement that Captain—

Mr. Paul: I am going to object, Your Honor. I haven't heard the question yet but—I may be untimely, Your Honor, but I am going to object to any leading questions of this witness.

Mr. Packel: Your Honor, I would—

The Court: That is your right and privilege.

Mr. Paul: Yes, sir.

The Court: And when a leading question is asked you may of course object.

Mr. Paul: Yes, sir.

The Court: I appreciate your forewarning us in advance that you are going to do that.

Mr. Paul: Yes, sir.

By Mr. Packel:

Q. To repeat, Captain Ferguson, in this case one of the statements made over WIP Radio was that Captain Ferguson believes they had hit the supply of a main distributor of obscene material in Philadelphia.

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Did you make any such statement to WIP?

Mr. Paul: I am going to object to that question, Your Honor, as being leading.

I think the question—I think we are concerned about what statements he made to WIP.

The Court: That is what he is asking him about.

Mr. Paul: But he is putting the questions in the witness' mouth—the answer in the witness' mouth by saying this statement was made, and did you make that statement.

The question should be properly phrased, "What statements did you make?"

Mr. Packel: May I comment?

The Court: No, overruled.

A. I made a statement to WIP that it was a large raid and Mr. Rosenbloom was one of the main distributors for the City of Philadelphia of these obscene books.

That is the information I gave WIP.

Mr. Packel: No further questions.

CROSS-EXAMINATION

By Mr. Paul:

Q. The statement you made is that Mr. Rosenbloom was one of the main distributors in Philadelphia?

A. Main distributors in Philadelphia?

Q. Did you say he was the largest distributor in

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Philadelphia?

A. I said he was a very large distributor because he had a truckload of books.

Q. Are you familiar—

A. Then we made a second raid on Mr. Rosenbloom.

Q. I assume that in 40 years in the Police Department you have expertise in smut and obscenity; is that correct, sir?

A. Well, I have quite a bit of experience—not 40 years, 48 years.

Q. You have a lot of experience in this area?

A. Yes, sir.

Q. Do you not?

Q. Do you know who the publishers are that are publishing all this material in Philadelphia?

A. I don't think—these books were published outside of Philadelphia.

Q. Do you know the publishers of all these magazines that were in your raid?

A. I couldn't say. As I said before I think the biggest majority of these books was published outside of Philadelphia.

Q. All right, did you ever hear of Parliament News?

A. No, sir.

Q. Did you ever hear of Dale Books?

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A. No.

Q. Did you ever—have you ever heard of the magazine Gent?

A. No.

Q. Gent?

A. No.

Q. Have you ever heard of the magazine Rouge—excuse me, Rogue?

A. Row, R-o-w?

Q. Rogue. R-o-g-u-e.

A. Not to my knowledge.

Q. You have heard of the magazine Playboy, have you not?

A. I believe I have heard of that.

Q. Have you heard of the magazine Sunshine and Health?

A. No, I never saw that.

Q. Do you know there is a famous line of Supreme Court cases by the name of Sunshine and Health?

Mr. Packel: I will object, Your Honor.

The Court: Sustained.

By Mr. Paul:

Q. Have you heard the name Mervin Mounce?

A. No.

Q. Do you know that Mervin Mounce is the publisher of the Outdoor American Corporation?

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Mr. Packel: I will object. He has testified that he—

The Court: Overruled.

Mr. Packel: —does not know the publishers.

A. I don't know.

Q. Do you know—were you present at Mr. Rosenbloom's trial?

A. I don't believe I was. I know he was tried by Judge Ullman.

Q. And Officer Cristelli of your force was present; is that correct?

A. Cristelli works for me.

Q. Incidentally, when you made these arrests did you consult the District Attorney's office?

Mr. Packel: I will object, Your Honor. I don't see where this is cross-examination.

The Court: Overruled.

A. I didn't consult the District Attorney's office, no.

Q. And you took—

A. I was in charge of the raid.

Q. Right, and you took—

A. I commanded the raid. It was my squad, the Special Investigation Squad that made the raid.

Q. And you took it upon yourself to determine what was

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obscene and what wasn't obscene; is that correct, sir?

A. Well, I imagine I could tell what would be obscene and what would not be obscene. I ain't a little boy six years of age.

Q. Could the Supreme Court of the United States tell, do you know, sir?

Mr. Packel: I will object, Your Honor.

The Court: What kind of a question is that? I don't know whether the Supreme Court can tell or not, to be truthful with you, after reading the decision, but go ahead.

By Mr. Paul:

Q. In this case Judge Ullman differed with you, did he not?

Mr. Packel: I will object.

The Court: Overruled.

A. I couldn't say. I wasn't there.

Q. You had a report from your police officers, didn't you?

A. They come back and make a written report and then we file them.

Q. You don't read their written reports?

A. I read all I can, sure. I have got 40, 50 men working all the time.

Q. Listen; before you arrested George Rosenbloom did you

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have a large investigation about him?

A. We had an investigation who the supplier might be.

Q. Did you have Mr. Rosenbloom's name?

A. I just heard his last name. We didn't have no first name.

Q. Did you know where Mr. Rosenbloom lived?

A. Not until a later date.

Q. That wasn't in your investigation?

A. We were trying to get him identified.

Q. Are you familiar with what a member of your staff, Officer Cristelli testified to at Mr. Rosenbloom's trial?

A. I can't speak for any member of my staff. I wasn't there. I don't know what they testified to.

If I was in the courtroom I would tell you.

Q. You supervise them, don't you?

A. I am the boss.

Q. And you control what—

A. The captain of the squad.

Q. —what goes on in the squad?

A. I am captain of the squad.

Q. Incidentally, isn't it a fact that Howard Leary, the then Police Commissioner, didn't authorize these raids?

A. Sure, he authorized the raids.

Q. He authorized those raids directly to you?

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A. He gave me the investigation to complete.

Q. And he authorized you to raid the city in that manner?

A. He knew we were raiding the place.

Q. No, sir. That is not what I asked. He authorized you to make these raids? He told you to go out and make them?

A. That is correct.

Q. And you never said otherwise before?

A. I might have said he did or he didn't but my memory today is that I had the O.K. from the Commissioner of Police.

Q. Well, isn't it a fact that you appeared before the Federal Court and told them that Howard Leary—

The Court: Just a minute. If Captain Ferguson denies what you are asking him are you going to prove to the contrary?

Mr. Paul: Yes, I have a witness to that effect.

The Court: All right.

By Mr. Paul:

Q. Isn't it a fact that in Federal Court you made the statement that you took these raids on yourself and you never discussed it with Howard Leary, then Police Commissioner?

A. A raid of this size the Police Commissioner has to know. The Police Commissioner would have to know.

Q. Incidentally—

A. We used 50 policemen in this raid. If I am using 50

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policemen I have got to talk it over with my boss.

Q. Well, I don't know—

A. The Police Commissioner.

Q. I assume that you are denying what I just said? You are denying what I just said, obviously?

A. I don't—

The Court: Just a minute.

A. (Continuing) I don't remember the statement, I can tell you that.

By The Court:

Q. Captain Ferguson, the question is did you ever say on a previous occasion that you took this raid on yourself?

A. Not to my knowledge, Your Honor.

Q. All right.

A. A raid of this size, I would have to talk to the Police Commissioner. It would be regular routine that we are going out to arrest 25 or 30 people.

By Mr. Paul:

Q. I know you may have to but did you in this raid?

A. I talked to Commissioner Leary.

Q. I know you talked to Commissioner Leary. I want to know if you talked to him about this raid.

A. Sure, we talked to him about this raid.

Q. All right. Now, isn't it a fact that you had the

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21 news dealers under observation? Isn't that a fact?

A. Yes, we made purchases off the news dealers.

Q. Right.

A. We had to have them under observation.

Q. Did anybody make a purchase from Mr. Rosenbloom?

A. Not to my knowledge.

Q. As a matter of fact, Officer Cristelli was in the midst of making a raid when Mr. Rosenbloom walked up and he said, "What do you have there, nudist books? You are under arrest."

Mr. Packel: Your Honor—

By Mr. Paul:

Q. Isn't that the way it happened?

Mr. Packel: I object.

The Court: Sustained.

By Mr. Paul:

Q. Now, would you tell this jury what is your criteria—

Mr. Packel: Your Honor, I hate to interrupt but may I ask that he asks questions in a manner as though he is not appealing to the Lord, or God knows who?

The Court: Do you have an objection?

Mr. Packel: Yes, I object.

The Court: Overruled.

By Mr. Paul:

Q. Now, would you tell this jury what your criteria is

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for obscenity?

A. Any time the private parts is showing of the female or the private parts is shown of males and they are offered for sale to the public, that is what I consider the answer, Mr. Paul.

Q. Very good.

Now, would you tell this jury when is the last time you raided the Art Museum?

A. Did anybody ever raid the Art Museum?

Q. No, you? When is the last time you raided the Art Museum?

A. I didn't raid it.

Q. Did you ever go in there?

A. I never was in there.

Q. Do you know what pictures they have in there?

A. I don't know where the Art Museum is, unless you mean up on the Parkway.

Q. You have been a police officer for 48 years in the City of Philadelphia?

A. Right.

Q. You don't know the Philadelphia Art Museum, that everybody refers to on the Parkway?

Mr. Packel: I will object, Your Honor.

The Court: Overruled.

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By Mr. Paul:

Q. You don't know?

A. I am no art patron of any kind. I don't go to art classes or anything like that. I don't talk about art.

Q. Well, would it surprise you to know that hanging in the art galleries in the City of Philadelphia and in the art galleries throughout Philadelphia for sale to the public are nude pictures of men and women, painted by artists?

A. I never knew that, that you could go into the Art Museum and buy nude pictures.

It's a wonder it ain't crowded up there with people buying them pictures.

Q. When is the last time you were in the Public Library?

A. When I went to school, over 50 years ago.

Q. Have you run an investigation as to what books the Public Library has?

Mr. Packel: Again I will object, Your Honor. They are not there offered for sale to the public, as the witness has testified.

The Court: They are offered for distribution.

A. If we had a complaint against the Public Library I would investigate it, sure, if they had obscene books. I never had any complaints but I had complaints about the newsmen, the newsstands.

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Q. So what you are telling this jury is that you don't do anything about obscenity unless you get complaints; is that correct?

A. Well, it is mostly complaints that we work on.

Q. So that you have no investigation, you have made no wide scale investigation? If I am correct you just got a complaint and you checked out 21 newsboys in this instance; is that correct?

A. That was the big investigation, 21 newsstands, and there was all purchases. Police officers made a purchase.

Q. And then you looked and members of your staff looked at every purchase that you made and you determined these books were obscene and these books were not obscene; is that correct?

A. I used my common sense, yes.

Q. All right, and you personally looked at every single book?

A. Every book that was purchased.

Q. Now, when you looked at these books and you made the arrests and you told WIP, did you know what the law of obscenity was?

A. I told WIP the information of the raids. That is what I gave them.

Q. No, my question is at the time you made the arrests

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and examined these books, did you know what the law of obscenity was?

A. My own common sense, where there is an exposure of private parts of a female or male, I figure that is obscene, especially being offered for sale on newsstands and anyone can purchase them.

Q. Did you ever raid a nudist camp?

A. I have no business raiding a nudist camp. There is not any in Philadelphia that I know of.

Q. In your estimation would that be an obscene situation, a nudist camp?

A. That would be questionable. That would be taken up with the District Attorney and his decision would be law.

Q. Why in this case weren't the books taken up with the District Attorney and his decision would be law?

A. The Police Department thought it was obscene and they believed it to be obscene, and the warrants were sworn to and the people placed under arrest for selling these books.

Q. Would you tell me prior to this raid and in your 48 years experience as a police officer, when is the last time that you know about that the police officers made the determination as to which magazines and books were obscene?

A. Back in the late forties Inspector Ellis and myself conducted a similar raid to this raid where we had purchased

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the books off the newsstands and we arrested a large number of people.

Q. And at that particular time the law was quite different from what is it today; is that correct?

A. There is some Supreme Court decisions come along at later dates.

Q. You don't know what they are, do you?

A. No, I don't read the law, I just try to enforce the law.

Q. How can you enforce the law if you don't know the law?

A. I try to know as much as I can. We have in-service training in the Police Department. You go to the Police College every so often for refresher courses, and that hits me and it hits every member of the Police Department.

Q. Now, you testified that you called WIP?

A. I called WIP, yes, sir.

Q. Now, is it your responsibility to call up the news people, media, and give them information upon your activities?

A. I give them my information of big activities. If we have a raid that I think the public should know about I give it to the press. I don't only give it to WIP Radio Station, I give it to the newspaper reporters.

Q. Well, let's confine ourselves to WIP. Why did you call them up?

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A. I always call them. I just called them last night on a job.

Q. And who authorizes you in the Police Department to give news releases?

A. The Commissioner.

Q. Now, let me ask you a question, Mr. Ferguson. Isn't it a fact that you like the self publicity?

A. What?

Q. You like self publicity? You like to see your name in the paper and over the radio?

A. No, my name has been put in the paper over the years.

Q. And you put it there?

A. I am compelled to let the public know what is going on.

Q. Do you have any articles or regulations that say that you are compelled to tell the papers what is going on?

A. We are compelled to give out the news.

Q. Point to some authority; how, where, what regulation.

A. The Police Commissioner wants the police news forwarded to the proper persons to use in the press, in the papers, the radio stations, and also television.

Q. Doesn't the police administration have their own news staff to give releases to the press?

A. No, you are wrong there.

Q. Does anybody pay you for any of this news information

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that you release?

A. Sure not. They don't pay me.

Q. Do you know how many books were taken from Mr. Rosenbloom? Let me qualify that.

You know there is a difference between books and magazines, I am sure you know that, and my question is do you know how many books were taken from Mr. Rosenbloom?

A. I think there was a majority of them magazines, more so than there were books.

Q. All right.

A. At 15th and Market, and then from his barn up at his home there was a big load taken out of his barn, two or three days later, after October 1st.

Q. Now, when is the last time you talked to anybody about this case?

A. Just this morning.

Q. Who did you talk to?

A. Mr. Packel.

Q. And he went over your testimony, did he not?

A. He did, to a certain extent.

Q. And he asked you certain questions, did he not?

A. He told me he subpoenaed me. I didn't know who subpoenaed me.

Q. Did he review any of your testimony with you?

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A. He asked me if I remember the details of the raid. I said I do, some of the details, not all the details.

Q. And did he indicate any important parts that Mr. Packel was interested in?

A. No, sir.

Q. He didn't indicate any important parts?

A. No, sir.

Q. Incidentally, the Police Department has meticulous records about this raid and this arrest, do they not?

A. They have the copy of the records, a copy of the police reports that was made out at the time of the arrest.

Q. It is called the 52, is it not? You have a 52 Report; is that right?

A. 52 and 49.

Q. 59?

A. 49 and 52.

Q. It is the full information reports as to the details of this arrest; correct?

A. There is a report made up, sure.

Q. Did you bring it with you?

A. No, sir.

Q. Then what you are testifying to you are trusting from your memory; is that correct?

A. That is correct.

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Q. Is Officer Cristelli still in your squad?

A. He is, yes, sir.

Q. Do you know how many books and magazines, the total amount, that was taken from Mr. Rosenbloom?

Mr. Packel: I will object. This is in no way related to the direct examination. It is beyond the scope.

The Court: Overruled.

A. A truckload. You can imagine what a truckload is, a panel body truck.

Q. There are all sizes; quarter ton, half ton, two ton?

A. This was at least a half ton truck that was seized at 15th and Market.

Q. And what was in that truck?

A. These books and magazines.

Q. Would it surprise you—what kind of books?

A. Obscene.

Q. You are saying that that books taken from that truck was obscene?

A. Obscene, the books, and the magazines.

Q. Tell this jury what was in that book.

A. The pictures that I am telling you about, the males and females.

Q. The pictures were in that book?

A. Of males and females.

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Q. Would you be surprised to know now that that book was entitled "Nudism" and didn't have one single solitary picture in it?

A. There was more than one book. You are saying there was only one book that was seized in the truck.

Q. Books, books. It was only one type of book.

The Court: Wait. Who is testifying?

Mr. Paul: I am going to rephrase the question.

By Mr. Paul:

Q. When you refer to "book" and my question is, would you be surprised to know that all of these books, the books were—that you called obscene were one title, called "The Nudist"?

Mr. Packel: Your Honor—

By Mr. Paul:

Q. Do you know that?

Mr. Packel: I object, Your Honor. I think it should be made clear, although we did try to make it clear, that he is distinguishing between books and magazines.

The Court: That's right. Mr. Paul is now asking him about the books.

Mr. Packel: About the books in contrast to the magazines, because I think the witness is tending to think of books in terms of magazines.

Mr. Paul: No, he doesn't. I made it very

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specifically clear. I asked him that.

Mr. Packel: I wanted to make sure that it is clear.

By Mr. Paul:

Q. Is there any confusion in your mind between books and magazines?

A. Yes, there is. I thought that all books—I was calling the magazines books.

Q. You didn't hear when I said before that there was a difference between books and magazines?

A. I was confused with the books and the magazines. I was saying books and magazines both.

Q. Right.

A. The biggest part seized was magazines.

Q. What was that, sir. The biggest part of his truckload of stuff was magazines.

Q. Wasn't there a great quantity of books?

A. Not too many.

Q. How many books were there, do you know?

A. Maybe a couple hundred. The magazines outnumbered the books, and the same thing out of his barn.

Q. Weren't there several unopened cartons of books in that truck?

A. Not to my knowledge. I wasn't at the scene of the

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arrest.

Q. So you are guessing at everything; is that right?

A. No, I ain't guessing at everything. I am commander of the squad. I investigate everything the officers bring in. What I mean, we go over it.

Q. You looked through that book then, didn't you, the book we are talking about? You looked?

A. I don't remember that book.

Q. So how can you call it obscene?

A. You named it but there are so many different books and so many different magazines I couldn't tell what the names were.

Q. You said they were all obscene.

A. The biggest majority of them was obscene.

Q. Did you exclude that or did you take them all in?

A. We took them all in.

Q. You didn't look through those books and see if there were any like legitimate books in there, did you?

A. I looked the whole load over.

Q. You didn't find any legitimate books, though?

A. No.

Q. As a matter of fact you took Mr. Rosenbloom and everything he had in there, put him under arrest and called WIP and said, "I just made one of the largest raids in the City

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of Philadelphia."

Is that correct?

A. No, that is not correct.

Q. Do you know who the other distributors were in Philadelphia?

A. We never came up with any other.

Q. You never heard of United News, did you?

A. United News, yes.

Q. Do you know what they distribute?

A. A lot of newspapers, I know that.

Q. They distribute books and magazines.

A. They may, United News.

Q. Did you ever hear of Dale Books?

A. Not Dale, no.

Q. Did you ever hear of Mr. Silverberg from Dale Books?

A. No.

Q. Do you know what he distributes?

A. Never heard of him.

Q. Would it surprise you to learn that most of the books in those newsstands came from Mr. Silverberg of Dale Books?

The Court: Are you objecting?

Mr. Packel: Objection.

Mr. Paul: Pardon me?

The Court: You are asking an awful lot of

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questions here, Mr. Paul.

Mr. Paul: Yes, sir. I have a witness to that effect.

The Court: And the innuendo is that the question that you asked is correct.

If you are not going to following that up I am going to censure you for it.

Mr. Paul: May I say Mr. Rosenbloom already testified to that, when I asked him about who the publishers were in Philadelphia.

The Court: He testified to that, yes, sure, but not—that is why I didn't stop you previously.

I don't remember any testimony that most of the books were from Dale Books.

By Mr. Paul:

Q. Sir, do you know that the District Attorney's staff has their own obscenity squad?

A. Now they have. Not at that time they didn't have.

Q. They didn't, sir?

A. Not to my knowledge, no, sir.

Q. Do you know Mr. Marvin Halbert?

A. Yes.

Q. Do you know me, sir?

A. Sure, I know you.

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Q. I was in the District Attorney's office too, wasn't I?

A. You were, for a while.

Q. That's right, and who was Mr. Marvin Halbert? What squad did he handle?

A. I don't know. He never told me.

Q. Did Mr. Marvin Halbert ever appear before any Congressional investigating committees on behalf of the District Attorney's office for the Obscenity Squad?

A. Not to my knowledge. I don't know Mr. Halbert's business.

Q. And you have been in the Police Department for 48 years?

A. Yes, sir.

Mr. Paul: I have no further questions, Your Honor.

Mr. Packel: No questions.

(Witness excused.)

Mr. Packel: By the way, Your Honor had asked me, and I said some time today, you would get these instructions.

The Court: Thank you.

Mr. Packel: Mr. Rosenbloom, will you take the stand?

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GEORGE A. ROSENBLOOM, recalled.

DIRECT EXAMINATION

By Mr. Packel:

Q. You have already testified, sir. You are still under oath, Mr. Rosenbloom.

As I recall you did testify that you are not a nudist; is that correct?

A. I was not asked that question but I am not a nudist.

Q. You are not a nudist?

A. No.

Q. I hand you the 1963 income tax form which you had supplied me with yesterday and ask whether that shows in the year 1963 you had a bookstore profit of $2,920.71; isn't that correct?

Mr. Paul: Wait. Objection, sir. This is his witness and the question is leading.

It is not my witness any more; it is his witness.

Mr. Packel: Your Honor, it is cross-examination. I have a right to lead in cross-examination.

The Court: Well, you haven't said that you are calling him as if on cross.

I assumed that you had.

Mr. Packel: I thought that was understood. I am calling him as if on cross, Your Honor.

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The Court: All right.

The Witness: Your question was—

By Mr. Packel:

Q. Doesn't that return show that you operated a bookstore in the year '63 for which you had a profit of $2,920.71?

A. That's right.

Q. Doesn't it also show that your partnership, G & L Distributors, had a profit in the year of 1963—as I recall you said you started operating May 5th, I believe of that year?

A. That's right.

Q. Doesn't that show a profit for all those months of $768.11?

A. That's right.

Q. So that assuming that you and your wife had an equal share in the partnership your earnings for all those months, your personal earnings would have been $384?

A. That's right.

Q. And that is a period roughly of seven months; that is the amount that you made?

A. No, this is the report for the year.

Q. That's right.

A. But I didn't work seven full months as a distributor.

Q. I thought you said you started in May.

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A. I did.

Q. Isn't that seven months?

A. On October 1st I did not conduct hardly any business as G & L Distributors.

Also, this sheet shows that there was a loss of goods sold of $1,112—wait a minute, of $11,126.11.

Q. You say a loss of goods sold?

A. Oh, yes.

Q. Or a cost of goods sold?

A. Oh, excuse me. Yes, cost.

Q. Of course, that is what you had to pay for the books?

A. Yes.

Q. Can you give us a reason why you didn't produce your 1964 tax returns?

A. I turned my office over at home last night and I simply cannot find it.

Q. I see. You found all the returns but you just couldn't find one for 1964?

A. I could not find it. I will turn my office over again. I searched through my office till about 1:00 o'clock this morning and I couldn't find it.

Q. Could that mean that maybe you didn't file a return?

A. I certainly did file a return.

Q. Can you give us your best recollection of what your

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G & L profit was on that return?

A. I couldn't possibly but I can do this. During the lunch hour I will try to go over to my accountant and get my W-2 Form that I did file for 1964 and 1966. I know that he should have those.

Q. Switching to another subject, did you know that around October 4th, 1963, that there had been another arrest in connection with alleged smut material?

A. Yes.

Q. Other than yours?

A. Yes.

Q. Or—you knew that?

A. Yes.

Q. As a matter of fact there were news headlines about that in the newspapers?

A. Yes.

Q. And there were announcements over the radio about that?

A. Yes.

Q. By many stations?

A. No, on October 4th, 1963, there were seven arrests that day. There were two near the airport in Southwest Philadelphia. There was the raid on my home, and there were four arrests by the District Attorney of Delaware County.

One was in Marcus Hook, one was in Chester, one

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was in the 69th Street area, and the fourth arrest was the owner of the Dale Books, Mr. Alex Silverberg.

Q. And all of these arrests were in connection with alleged smut; is that right?

A. No, they were in connection with—five of the seven arrests were in connection with obscene literature. Two of the arrests were for pornographic literature.

Q. How many cartons of the Eden magazine were seized?

A. When, or where?

Q. First, at your home.

A. At my home, I don't think they took any Eden out of my home. They might have taken one or two copies.

Q. And at your barn, how many cartons of Eden magazine were taken?

A. At the barn they took 17 cases.

Q. And how many were in each case?

A. 100.

Q. So 1700 copies of the Eden magazine—

Mr. Paul: If Your Honor please, I am going to object. Mr. Packel is about to hold that picture up and inflame the jury.

Mr. Packel: I am not going to inflame them. I am going to ask that they look at it.

Mr. Paul: I would like an offer of proof, if I

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may, Your Honor, respectfully, at side bar.

The Court: Oh, come, come. I don't think you need an offer of proof.

Mr. Paul: Well, I know—

The Court: We haven't gotten any place yet.

Mr. Paul: I don't think he ought to exhibit this.

The Court: Sit down, Mr. Paul. Sit down, Mr. Packel.

Go ahead.

By Mr. Packel:

Q. You said 1700 copies of the Eden magazine?

A. That's right.

Q. Were seized?

A. Yes.

Q. Now, first how much was the Eden magazine sold for?

A. $1.25.

Q. $1.25?

A. That's right.

Q. How much would the man at the newsstand make on that sale?

A. My wholesale price to him was 83 cents.

Q. So that he on each magazine that he sold, he would make 42 cents on each one of these magazines; is that correct?

A. That's right.

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Q. And how much would you make on each magazine that was sold?

A. My price was—my cost to me was—I think it was 61 or 62 cents.

Q. So that each one of these magazines that would be sold, you would make 21 or 22 cents?

A. Yes.

Q. Is that correct?

A. That's right.

Q. Now, these magazines were sold on the newsstands, weren't they?

A. Yes.

Q. Prior to—

A. They were sold on newsstands, they were sold in stores, they were sold in any place where magazines were sold.

Q. And they would be sold to anyone that would want to buy them, including young boys?

A. No, sir.

Mr. Paul: Objection, Your Honor.

The Court: Overruled.

A. (Continuing) Absolutely not. My instructions to every single account I had, I had two standing orders with them, and one of them was that these magazines are meant for adults and they are positively not to be sold to anyone under 21

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years of age.

Q. Do you have a copy of such instructions?

A. These are verbal instructions that I gave to every single account, and I insisted on this.

In fact I would—I had constantly advised every single account that I had that if you had any doubt as to the age of an individual, demand an identification card. If they cannot produce it, do not sell it to them.

Q. And of course you also supervised this to make sure your orders were being carried out?

A. It was impossible for me to supervise this.

Q. So you—

A. But this was my standing order. Also I had another.

This I could not order them, but I could request them. I always requested every single account I had that these magazines were to be distributed with just the title showing, and the reason for it was that as a businessman he depended on his livelihood from all kinds of people, and it was simply poor business to try to offend anyone, and those people who would want to buy these magazines would know them by the title.

These were two standing orders.

Q. Except you said this last one was not an order; it was a request?

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A. It was a request. I couldn't dictate how a man should run his business.

Q. You could dictate as to who he should sell them to but you couldn't dictate as to how he should display them?

A. I couldn't dictate either one. I could not run another man's business. I could not tell him—

Q. You don't know whether in fact these books were sold to boys of age 14 and 15, do you?

Mr. Paul: Objection, Your Honor. I don't think this has any relevancy.

The Court: I don't see the relevance of that, really.

Mr. Packel: I am just showing the nature of the persons to whom this book might appeal, and whether he knows whether these books were being sold to boys of age 14 and 15.

The Court: Yes, but I don't think that goes to whether they are obscene or not.

Mr. Packel: I think it has some bearing, and the circumstances of sale, but if Your Honor rules otherwise—

The Court: Well, I am sure the answer to your question is no anyway.

Mr. Packel: Then do you want him to—will you permit him to answer?

The Court: Sure.

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By Mr. Packel:

Q. You don't know whether these books were sold to boys of 14 and 15 years of age?

A. To my knowledge, no, and every time I would—I would be constantly mentioning this to all of my accounts, and they would constantly say we would never do it anyway.

Mr. Packel: I will ask that this book be marked.

(Copy of Eden magazine, quarterly issue No. 15, marked Defendant's Exhibit No. 1 for identification.)

By Mr. Packel:

Q. I asked you whether this magazine marked D-1 is a copy of the Eden magazine of which you said some 1700 were seized?

A. That's right.

Mr. Packel: Your Honor, I would like to have this passed among the jury, with my personal request that they need only to look on the front and back of the front cover and the front and back of the back cover.

Of course they can look at it more if they want to, but for my purposes—

The Court: Let me see it.

Mr. Paul: If Your Honor please, I would object, and further, if it is within Your Honor's ruling to allow it to be done, I would request Judge Ullman's entire opinion be

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read to the jury because he describes this adequately and accurately.

Mr. Packel: I object to this being said before the jury, Your Honor.

All I ask is that they be requested to take a quick look at the front and back of the front cover and the front and back of the back cover.

The Court: Well, it has not been offered in evidence yet.

Mr. Packel: Well, just as our broadcasts were read to the jury before they were offered in evidence, it seems to me that I have a right that the jury see this in the course of the examination.

The Court: Not until it is in evidence.

Mr. Packel: Then may I at this time offer this in evidence?

The Court: Admitted.

(Defendant's Exhibit No. 1 received in evidence.)

Mr. Paul: Of course, Your Honor, I object.
I would object to it being admitted into evidence.

The Court: What is the basis of your objection?

Mr. Paul: It is a collateral issue. It has nothing to do with the case, whether this book is obscene or not.

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Besides, Judge Ullman already ruled that this was not obscene.

Mr. Packel: I object to this statement being made before the jury.

Mr. Paul. His Honor made the statement.

The Court: We will take care of that. Your objection is overruled.

Mr. Packel: May this be passed among the jury?

The Court: Yes.

Mr. Packel: With the request that I have made?
Do you want me to hand it to them?

The Court: Yes, sure.

(Defendant's Exhibit No. 1 was circulated through the jury.)

By Mr. Packel:

Q. Now, there is nothing on the front or back of this magazine that says it is to be sold only to persons over 21, is there?

A. Not to my knowledge, no.

Q. Would you go back to your testimony last week and refresh my recollection as to what you said was the difference between something that is nude, merely nude, and something that you considered obscene?

Mr. Paul: Objection, Your Honor. I don't think
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this witness is here to refresh Mr. Packel's recollection, but to inform the jury of the facts.

The Court: Overruled.

By Mr. Packel:

Q. Forget about my recollection.

Mr. Packel: Did you say overruled, Your Honor?

The Court: Yes, sure.

A. I don't recall that I mentioned anything about what was obsecene or not.

I did say the policies of the Outdoor American Company, and that was to screen every picture that they took to make sure that it was in good taste. I said it was possible if a photographer was not careful or if he intentionally wanted to, the innocent act of standing up or sitting down or bending down to pick up a flower, if a photographer wanted to or wasn't careful he could get very suggestive poses, and that this is something that Mr. Mounce told me—

Mr. Packel: I object to what Mr. Mounce told you. I think you have answered the question.

By Mr. Packel:

Q. That was what I thought you said, something which was suggestively posed; you say you would not consider it a nudist thing but you would consider it obscene?

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A. No, I didn't say that. I said that was not in good taste. I never said anything about obscenity. I don't know the law.

Q. You were just saying what is nudism in contrast to something that is not in good taste?

I thought you were making a distinction, if I am wrong, tell me, between what you considered legitimate and what you considered illegitimate pictures.

A. That's right.

Q. So you would consider it an illegitimate picture if it were suggestively posed?

A. That's right.

Q. And I asked you to look at the front cover of this magazine, the front and back of the front cover and the front and back of the back cover, and tell me whether they do not appear to be suggestively posed?

A. I don't have a magazine here.

Q. I thought it was. I am sorry. I thought you had it in your hand.

(Mr. Packel handed Exhibit D-1 to the witness.)

A. No.

Q. You don't think any of them are suggestively posed?

A. No.

Q. The publisher that you speak of, they were in business

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for profit, weren't they?

A. Yes, sir.

Mr. Packel: No further questions.

Mr. Paul: Wait, Mr. Rosenbloom.

CROSS-EXAMINATION

By Mr. Paul:

Q. During your entire prosecution, your arrest and your trial in the Federal Court—

Mr. Packel: Your Honor, may I suggest that he shouldn't lead the witness?

The Court: No, no, no. Everybody is jumping—

Mr. Packel: He has already made so many statements, Your Honor.

The Court: No, no, no, not at all. He is asking a question.

Go ahead, Mr. Paul.

By Mr. Paul:

Q. Did anybody besides what happened in the courtroom today mention children?

A. No, sir.

Q. Had any one of your accounts been arrested for selling any of your material to children?

A. No, sir.

Q. Was that book that you looked at exhibited to Judge

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A. Yes, sir.

Mr. Packel: I will object, Your Honor.

The Court: Overruled.

By Mr. Paul:

Q. Among others; is that correct?

A. Yes, sir.

Q. And was there any legal tribunal that ever found any of your materials obscene?

Mr. Packel: I object, Your Honor.

The Court: Sustained.

By Mr. Paul:

Q. Were you ever requested to submit any of your materials, which is the subject of this case, the books and magazines, to WIP Radio?

A. No.

Q. Did Mr. Packel in advance of this trial ask you to submit any of these magazines?

A. No, sir.

Q. Did Mr. Packel take your deposition?

A. Yes, sir.

Mr. Packel: Your Honor, I will object

The Court: Sustained

Mr. Packel: I don't see the relevancy of this.

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By Mr. Packel:

Q. Do you know, there is another publisher of this type; is that correct?

A. Yes.

Q. Is that publisher still in business today?

Mr. Packel: I will object, Your Honor.

The Court: Sustained.

Mr. Paul: If Your Honor please—

The Court: Sustained.

By Mr. Paul:

Q. Did you ever sell the Sunshine and Health magazines?

A. No.

Mr. Packel: I will object, Your Honor.

The Court: He said no.

By Mr. Paul:

Q. The vice president of the Outdoor American Company, which is the publisher of this magazine, is Norval Packwood, is he not?

A. Yes, sir.
Q. His main office is in Mays Landing, New Jersey?
A. That is correct.
Q. That is where the nudist camps are?
A. Yes.
Q. Is that the only nudist camp there?

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A. No, there are two there.
Q. Which is the other one?

Mr. Packel: I will object, Your Honor.

The Court: Sustained.

By Mr. Paul:
Q. Were those magazines also kept in that nudist camp?
A. Yes.

Mr. Packel: I will object, Your Honor. I don't see the relevancy.
He has answered. I will withdraw the objection.

By Mr. Paul:
Q. While you were distributing these magazines you were crossing state lines, were you not?
A. Yes, sir.

Mr. Packel: Your Honor—

By Mr. Paul:
Q. Did the FBI arrest you?

Mr. Packel: I object, Your Honor.

The Court: Oh, sustained.

By Mr. Paul:

Q. Do you know if the District Attorney's office had your business under investigation?

Mr. Packel: I will object, Your Honor.

The Court: Sustained.

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By Mr. Paul:

Q. Did you work with the District Attorney's office?

Mr. Packel: I will object, Your Honor.

The Court: Sustained.

Mr. Paul: I have no further questions, Your Honor.

If I may, in the interest of saving time, Your Honor asked me to follow up certain information that I asked Mr. Ferguson.

I can ask one question now while Mr. Rosenbloom is on the stand as part of my cross-examination, if Mr. Packel has no objection.

Mr. Packel: I have no objection, if it will simplify matters.

Of course, I have the right to object after I hear the question.

The Court: Sure.

By Mr. Paul:

Q. You heard me question Captain Ferguson, did you not?

A. Yes, sir.

Q. In reference to the books that were on the newsstands throughout the city, who was the major distributor of that type of material?

A. Dale Book Company.

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Q. Who was the owner of Dale Book?

A. To my knowledge, Alexander Silverberg.

Q. All right, and was Alexander Silverberg under arrest?

A. Not in Philadelphia, no.

Q. Where?

A. In Delaware County.

Q. Out around 69th Street?

A. Yes.

Q. Was that at the same time that you were under arrest?

A. The same day.

Q. And who would you say was the major distributor of this—

Mr. Packel: Now, this appeared—I will object, Your Honor, because this was in his direct testimony.

Mr. Paul: I will withdraw the question. I have no further questions:

RE-DIRECT EXAMINATION

By Mr. Packel:

Q. I want to clarify one matter as to your—one of your last answers.

Dale Book that you are talking about had entirely different books or magazines that they were distributing, not the same ones you were distributing, were they?

A. That is correct. They were published by an entirely

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different publisher, yes.

Mr. Packel: No further questions.

The Court: I have just remembered; could I see D-1? Oh, you have it.

By The Court:

Q. This does not seem to have a date on it anywhere, Mr. Rosenbloom.

A. No, sir. They put numbers on; issue number 15, 16, 17.

Q. This bears issue number 15?

A. Yes.

Q. When would that be, do you know?

A. Yes, that was the Eden issue for September, 1963. Eden would—was a quarterly magazine. It would come out every three months.

Q. Was this the magazine that was seized?

A. Yes, sir.

The Court: All right.

Mr. Packel: The testimony was that 1700 of these were seized.

The Court: I wanted to make sure it was the same one

Mr. Packel: I thought he had testified to that before.

(Witness excused.)

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Mr. Packel: Mr. Rust.

PAUL RUST, recalled.

DIRECT EXAMINATION

By Mr. Packel:

Q. Mr. Rust, you have already been sworn so you are still under oath.

You testified that you were the news editor for the defendant. How long had you been the news editor?

A. Since 1960, April.

Q. Now, will you tell us the number of news broadcasts that are made by WIP daily?

A. We have at least two scheduled newscasts an hour, 24 hours a day, seven days a week.

Q. Now, is it usual or customary to have repeats of the same story in your broadcasts?

A. This is quite routine, yes.

Q. Prior to this litigation you did not know Mr. Rosenbloom?

A. No.

Q. And from your investigation no one else in your organization knew Mr. Rosenbloom?

A. Not to my knowledge, no.

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Q. Are you familiar with the practice of radio media in this community with respect to reporting news?

A. Yes, I am. I have a fairly good idea of the individual operations of the five major stations.

Q. What was that?

A. I have a fairly good idea of the operation, these operations of the five major radio stations, yes.

Q. And how do you have such information?

A. Well, this is fairly—it is not a—there is an amount of communication among the various stations in the city by the news directors, among the newsmen themselves.

Q. And are you familiar with the checking up that is done with respect to stories by radio stations in this community?

Mr. Paul: One moment, sir. Your Honor, I would object to this question.

I would object to this question and this line of questioning.

The Court: Sustained.

A. Yes, I would say I—

Q. No, the Judge has ruled that you may not answer.

A. I am sorry.

Q. The broadcasts of WIP in the period in question, as far as you know, were they checked out?

Mr. Paul: Objection, Your Honor. The question

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is leading and calls for a conclusion.

The Court: Yes, I think that's right.

Mr. Packel: I was going to the next question, how they were checked out.

By Mr. Packel:

Q. Well then, what checking if any was made with respect to the news stories in question here?

A. Are you talking about the first few stories, the first I think through the—on the arrest of Mr. Rosenbloom?

Q. Yes.

A. Are these the stories you are talking about?

Q. I am talking about both, but give them to us separately, if you can.

A. The first information as I recall, and I don't know specifically, it might have been received directly from Captain Ferguson. He may have given us the first word. I am not sure whether he called us first, or called UPI first, or whatever.

Furthermore, on the first we were alerted to the—it is difficult for me to recall since I can't place in order actually whether he had called us or called the wire first.

Routinely he will do this, if he has a story of reasonable consequence. Usually if it hits the wire it hits most radio stations in the city as it hit WIP.

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I believe, however, Captain Ferguson was our initial source of information for this story.

Q. Now, wasn't it a fact that the story was also carried even prior to your October—was it or was it not a fact that stories were carried prior to October 4th by other news media?

Mr. Paul: Objection, Your Honor. It is certainly—I object on the ground that it is irrelevant, sir.

The Court: No, overruled.

A. Yes, there were newspaper accounts I think October 1st of 1963, and there were additional stories following.

Mr. Paul: Mr. Packel is showing me a newspaper clipping.

I will object, Your Honor. I have law on that, if Your Honor will see me at side bar.

Mr. Packel: I haven't done anything yet.

The Court: That's right.

Mr. Packel: I ask that this be marked D-2.

(Copy of The Evening Bulletin, Tuesday, October 1, 1963, page 3, marked Defendant's Exhibit No. 2 for identification.)

By Mr. Packel:

Q. I show you D-2 and ask you whether you recall seeing the original, of which this is a photostat, in the Philadelphia newspapers?

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Mr. Paul: Objection, Your Honor.

The Court: Overruled.

A. I saw that, and others.

Q. And what is the headline?

Mr. Paul: Objection, Your Honor.

By Mr. Packel:

Q. What is the date of this publication?

Mr. Paul: Objection, Your Honor.

The Court: Overruled.

A. This is October 1st, 1963.

Q. And whose publication is it?

Mr. Paul: Objection, Your Honor.

The Court: Overruled.

A. Evening Bulletin.

Q. And what is the headline with respect to this story?

Mr. Paul: Objection, Your Honor.

The Court: Overruled.

A. "Police Raiders Arrest 21 in Sale of Smut. 5,000 Books and Magazines are Confiscated."

Q. By the way, around this time there had been another arrest of a Baltimore pair in connection with smut, was there not?

A. Yes.

Q. Did you see newspaper accounts with reference to that?

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A. If I recall that story was played quite well, yes.

The Court: Could I see D-2, please?

Mr. Packel: I am sorry, Your Honor. I should have shown that to you before I showed it to the witness.

The Court: Thank you.

Mr. Paul: May I see Your Honor at side bar?

The Court: No.

By Mr. Packel:

Q. Mr. Rosenbloom testified and talked about a call to the station, and he referred to a beep.

Do you want to explain to the jury just what the significance of that is, or just what that relates to?

A. Much of our leg work or routine gathering of news is done by phone, and to prohibit the inadvertent use of the voice without the caller's knowledge, why, the beep is imposed on that phone and any time we have an actuality or a voice on the air it is with the individual's knowledge, since the beep is on all phones that are recording.

In other words we can't air a report without the beep on it. If the beep is not on, the beep is turned off, then it cannot be recorded and it cannot be heard.

Q. Now, as a matter of fact if I were to call you on the telephone would there be the beep?

A. The chances are it would be. If the beep wasn't there

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we could not be recording. The beep is—there are limited reasons why the beep would be turned off. It might be a newsman talking to his wife in a private conversation where he might shut it off during that conversation, but beyond that, why, the beep is on at all times, on all phones incoming to the newsroom.

Q. So that if anyone would call normally such a beep would be heard?

A. Yes.

Q. If anyone called one of your reporters?

A. Yes.

Q. Did you have any reason to trust or distrust reports which you received from Captain Ferguson?

Mr. Paul: Objection, Your Honor.

The Court: Overruled.

A. No, no, I didn't.

By The Court:

Q. You mean you—

By Mr. Packel:

Q. You didn't what?

A. I had no reason to distrust what he had given me.

Q. Well, now—

A. In other words I believed in the evidence he had given me, the story he had given me.

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Q. Had he ever given you a story which you found to be untrue?

Mr. Paul: Objection, Your Honor.

The Court: Overruled.

Mr. Paul: We don't know what the story is.

A. Not to my recollection, no.

The Court: You understand, Mr. Paul, he didn't answer that—

Mr. Paul: Yes, sir.

The Court: —that Captain Ferguson never gave him a story that was untrue.

He testified he never gave him a story that he found to be untrue.

By The Court:

Q. That is correct, isn't it?

A. Yes, sir.

The Court: We will recess.

Mr. Paul: Thank you.

(Short recess.)

By Mr. Packel:

Q. Mr. Rust, I refer you to D-2, the story in the Bulletin.

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Could you tell us the significance of that report, as to it being brought to the attention of other news media?

Mr. Paul: Objection, Your Honor.

The Court: I don't understand the thrust of the question.

Mr. Packel: It is to show that this story went to lots of other sources on October 1st, the Bulletin story.

The Court: Well, that shows that it went at least to the Bulletin.

Mr. Packel: Yes. Now I am asking whether this, because of his knowledge of the industry, indicates any greater circulation than just to the public through the Bulletin.

The Court: If he can answer that.

Mr. Packel: Yes.

The Court: I don't know.

A. Well, Your Honor, routinely the Bulletin is in effect part owner of the Associated Press, as most subscribers to Associated Press are.

The Bulletin—the Associated Press is officed in the Bulletin, and any carbon copy of any story used in the Bulletin is placed on the hook for the Associated Press newsmen.

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They immediately edit that story down and throw it on the wire and all broadcast subscribers to Associated Press are very naturally exposed to that story; that is, all radio stations and television stations.

Mr. Paul: Your Honor, I am going to object to the answer and ask that it be stricken.

The Court: No.

By Mr. Packel:

Q. Now, Captain Ferguson testified that he had given the story to United Press, and you are now telling us that the story was also given to Associated Press?

Mr. Paul: I object, Your Honor.

The Court: Sustained.

Mr. Packel: I haven't finished my question.

The Court: Oh.

By Mr. Packel:

Q. Can you tell us which stations in Philadelphia therefore must have received this—would have received this same news routinely?

Mr. Paul: Objection, Your Honor.

The Court: Sustained.

By Mr. Packel:

Q. As far as your organization was concerned at the time of each and every one of these broadcasts did the station

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believe that they were the truth?

Mr. Paul: Objection, Your Honor.

The Court: Overruled.

A. Yes, at that time we had—we believed the story, yes, the information given us.

Q. You heard Mr. Chuse on the witness stand speak of something he heard over the radio.

If such a statement had been made over WIP would it have come to your attention?

Mr. Paul: Objection, Your Honor.

The Court: Overruled.

A. I feel certain it would have; if not my attention, someone, and they in turn would get to me, naturally.

Q. I think you have already testified that in your original testimony that there were no significant additions to any of the broadcasts, in any form, in any language other than what appeared in this script as to which you testified; is that correct?

A. The only exception I would make to that might be, for example—

Mr. Paul: Excuse me, sir. I would object to the question, Your Honor, and if necessary the response, because the question is leading, sir.

This is his witness.

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The Court: Overruled.

A. (Continuing) The only exception I would make to that would be that a newsman ofttimes is pressed at the deadline and he might not have time to edit the copy he has written.

As a result, in reading that, and usually a newsman reading aloud on the air live will read a line or so ahead and he will catch inadvertent errors, particularly as they pertain to the most important information, but for one to ad-lib or make an utterance as was testified by Mr. Chuse, why, is beyond my comprehension by a newsman over WIP.

Mr. Paul: Objection, Your Honor. I ask that the response be stricken. It is not responsive, and he is making a conclusion which has no foundation.

The Court: Overruled.

Mr. Packel: No further questions, Your Honor.

CROSS-EXAMINATION

By Mr. Paul:

Q. Sir, you looked at the Bulletin story; is that correct?

A. Yes.

Q. Do you know what happened to the Bulletin as a result of that story?

A. No, I don't.

Q. Have you checked the records of any other proceedings,

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sir, as it concerns that story?

A. Just those at the end of the month of October, the Federal case in which Mr. Rosenbloom sought an order to cease and desist.

Is that what you are talking about?

Q. No, I am talking about the suit against the Bulletin. Do you know the conclusion of that case?

Mr. Packel: I would object, Your Honor. There has been no testimony about a suit against the Bulletin.

The Court: There certainly hasn't.

By Mr. Paul:

Q. Do you know that there has been a suit against the Bulletin for that story?

A. No.

Q. Is it your testimony, sir, that you are privileged to repeat stories, and other news media, without consequence?

Mr. Packel: I object, Your Honor.

The Court: That is a question of law.

Mr. Paul: Pardon me?

The Court: That is a question of law.

By Mr. Paul:

Q. Well, let me ask you this question. Just because other news media act in a certain manner is it your company's policy to act in a similar manner?

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A. I don't understand the question; as it pertains to what, specifically?

Q. This article.

A. Would you pose your question again, please?

Q. I will rephrase it. For the background and the verification of your broadcasts, did that come from the Bulletin story?

A. I couldn't tell you that.

Q. Well, why do you allude to the Bulletin story?

A. I think it is quite significant to point out the fact that other radio stations beyond WIP had privy to that information which was disseminated, not only by Associated Press but also United Press International.

Q. And do you know if other news media broadcast the information in the same manner in which your station did?

A. This I don't know.

Q. Sir, could you tell the jury what you mean when you say that you believed that Captain Ferguson was telling the truth?

What do you mean by that?

A. I felt certain that—if I said believed it was—if there was implied reservation it wasn't intended, but I feel certain that the newsmen that handled that story believed the story was correct.

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Q. Now, when you speak of the truth you speak of facts that are in actual existence; is that correct?

A. The truth which is factual, yes.

Q. And factual means in existence or was in existence?

A. The truth is composed of the facts.

Q. And that is what news information is all about?

A. Yes.

Q. Getting the facts to the public?

A. Yes.

Q. How about opinions? Is the news media structured so as to get opinions of people to the public?

A. It is not the—a news-maker, as in politics, as we all well know, they express an opinion or a view and we will amplify that opinion by broadcasting it.

The same applies to many other stories.

Q. But by amplifying it would you also qualify some-

body else's opinion?

A. Would we, the newsmen?

Q. Yes.

A. Qualify it? Well, to what extent? What do you mean by qualify?

Q. On occasion doesn't your broadcast as well as other news media often make the statement that the opinions expressed are not necessarily those of the sponsor or of the

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station?

A. No, we don't.

Q. You never say that?

A. No.

Q. So you lead the public to believe in many broadcasts—

The Court: We are going very, very far afield.

Mr. Paul: I am talking about obscenity, sir. I am getting to that.

The Court: Let's get to obscenity then.

Mr. Paul: Captain Ferguson's conclusions is what I am getting to, sir. He is repeating Captain Ferguson's conclusions.

By Mr. Paul:

Q. You did repeat Captain Ferguson's conclusion as to what was obscene and what was not obscene, did you not?

A. We rewrote the facts given us by him.

Q. Well, obscenity is not a fact, is it, sir?

Mr. Packel: Objection, Your Honor.

The Court: Mr. Paul, don't argue with the witness. It is perfectly apparent what they did; to me, anyway.

Mr. Paul: Yes, sir.

By Mr. Paul:

Q. Incidentally, sir, in checking out this news broadcast the only person you verified this one story from was Captain

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Ferguson and nobody else?

Mr. Packel: I will object. He didn't so testify.

Mr. Paul: He did so testify.

Mr. Packel: Then ask him the question and we will see what he testifies to.

By Mr. Paul:

Q. You did so testify to that, did you not?

A. No, I did not.

Q. Are you now telling me—well, what was your other verification other than Captain Ferguson?

A. I believe I said I didn't know.

Q. Do you know now?

A. No, I am sure I don't know now, as I did when you originally questioned me on the point.

Q. You didn't use the Bulletin for verification, did you?

A. This I couldn't say for a fact, no. I couldn't say that. There were many sources on that story as has been brought out here. You had your newspapers, you had your wires. We had the information from Captain Ferguson.

Q. Was Captain Ferguson mistaken when he said he called your station and gave you the information?

A. I believe he mentioned WIP and one other station.

Q. Yes, but—

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A. Was he mistaken when he said that? No, I am sure he wasn't.

Q. Then is it your testimony that Captain Ferguson called your station before you called him to verify the story?

A. This I couldn't answer. I don't recall.

Q. You don't know. Sir, you never attempted—not you, your station never attempted to verify this information with Mr. Rosenbloom, did you, sir?

A. If you had been in the news business I think you would find it most difficult to contact a man who had been charged.

I think first or foremost you attempt to contact the attorney or the counsel for the arrestee. He will usually say what's what.

It has been a rare occasion when I will contact a man arrested and he will be allowed to utter a word, and I think for the most part I think you will find most newsmen are most reluctant about talking to a defendant.

Q. Sir, would it be the policy of your company in verifying information or what you think should be the policy and good practice in verifying the information that if a source accused a person of a heinous crime—

Mr. Packel: Your Honor, I object. This is being a speech to the jury.

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The Court: Sustained.

By Mr. Paul:

Q. If somebody accused me of a crime would you consult me?

Mr. Packel: I will object, Your Honor. He has already answered this question.

The Court: Sustained.

Mr. Paul: Thank you, sir.

Mr. Packel: You are finished?

Mr. Paul: Yes.

Mr. Packel: No further questions.

(Witness excused.)

Mr. Packel: The defendant offers Defendant's Exhibit 2. I think we have already had admitted in evidence D-1, so we now offer D-2.

Mr. Paul: I would object, Your Honor.

The Court: Overruled.

(Defendant's Exhibit No. 2 received in evidence.)

Mr. Packel: The defendant rests, Your Honor.

Mr. Paul: Mr. Rosenbloom, will you take the stand?

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GEORGE A. ROSENBLOOM, recalled.

DIRECT EXAMINATION

By Mr. Paul:

Q. Mr. Rosenbloom, you heard me question Captain Clarence Ferguson?

A. Yes, sir.

Q. Did you hear me ask Captain Clarence Ferguson if he ever made a statement to the effect that he did not get any authorization or any orders from his superior, the Commissioner of Police, Commissioner Howard Leary?

Mr. Packel: I will object, Your Honor.

The Court: Overruled.

By Mr. Paul:

Q. Did you hear me ask that question?

A. Yes.

Q. Now, were you—

Mr. Packel: The basis for my objection is he is trying to impeach him as to a collateral matter, Your Honor, that is not really before us.

The Court: No, overruled.

By Mr. Paul:

Q. You were present—let me ask you this question. Were you present when Captain Clarence Ferguson was in the Federal Court?

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A. Yes, sir.

Q. And did you hear him make statements to the contrary?

A. Yes, sir.

Mr. Packel: I object, Your Honor. If there is an original record of this sort I think that ought to be produced, and it shouldn't be based on what this witness is saying that he heard.

Mr. Paul: May I say, Your Honor, we don't offer his testimony as to the truth of any statement but merely as to the statement itself.

That is the only thing that is in issue.

Mr. Packel: The best evidence would be the statement that appears in the court record, if it was made, if there were a court record.

The Court: I don't know.

Mr. Packel: I assume there was, but he is talking about testimony in the Federal Court.

The Court: I don't know whether he is talking about testimony.

Mr. Packel: I thought that was made clear, that he is talking about testimony in a Federal case.

Isn't that part of the question?

Mr. Paul: Yes, I want to make it part of it right now.

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The Court: I didn't know that.

Mr. Paul: I know, Your Honor. I didn't finish the line of questioning.

The Court: I will permit the question.

Mr. Paul: Now, I forget what the question was.

(The following question and answer read aloud by the reporter:)

"Q. And did you hear him make statements to the contrary?

"A. Yes, sir."

By Mr. Paul:

Q. Now, in what case was that?

A. Dale Book Company versus Commissioner Howard Leary, District Attorney James C. Crumlish, Jr., and Captain Ferguson.

Mr. Paul: It is not in that case, Your Honor.

Mr. Packel: I renew my objection, Your Honor, on the ground that it is apparently officially recorded evidence.

The Court: I don't know that, Mr. Packel.

Mr. Packel: He said it is—

The Court: I don't know whether the notes were ever transcribed. I don't know anything about it.

Mr. Packel: All right, I will withdraw the ob-

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jection, Your Honor.

By Mr. Paul:

Q. What did you hear? What statement did Captain Ferguson make?

A. Captain Ferguson said that the raids on the newsstands were made on his authority. He ordered them.

Q. Did you do anything to the Bulletin as a result of this story?

A. Yes, sir.

Mr. Packel: I will object, Your Honor.

The Court: Sustained.

(Mr. Paul exhibited Defendant's Exhibit No. 2 to the witness.)

By Mr. Paul:

Q. Do you have any information concerning publications by other radio broadcasting stations?

A. No, sir.

Q. Was any complaint made to you concerning any other radio broadcasting station?

Mr. Packel: I object, Your Honor.

The Court: Overruled.

A. No, sir.

Mr. Paul: Thank you, sir. Cross-examine.

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CROSS-EXAMINATION

By Mr. Packel:

Q. You did have a complaint about a television station, didn't you?

A. Yes, sir.

Q. Doesn't that television station also have a radio station?

A. My complaint was not against the radio station, it was against the television station.

Q. So you did have a complaint against the television station but not against the radio station?

A. Yes, sir.

Mr. Packel: No further questions.

Mr. Paul: Thank you, sir.

(Witness excused.)

Mr. Paul: If Your Honor please, I have one additional witness that should have been here at 11:00 o'clock. He is on his way from Mays Landing.

He is a senior gentleman and I wonder if Your Honor would give us some recess time so that—he would be my last witness, sir.

Mr. Packel: May I have an offer of proof at side

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bar?

The Court: Yes.

(The following discussion at side bar:)

Mr. Paul: The vice president of the publishing company, Norval Packwood.

The Court: Who?

Mr Paul: Norval Packwood.

The Court: Of the—

Mr. Paul: Outdoor American Corporation will appear and will testify to the circumstances of employing Mr. Rosenbloom to distribute his magazine, possibly the profits involved, and the background of this particular magazine that was put in issue.

Mr. Packel: I will object, Your Honor, because I don't see that it is rebuttal testimony.

The Court: I don't think that is proper rebuttal.

Mr. Paul: If I may say, Your Honor, Mr. Packel has drawn in the question of the improperness of the magazine.

Mr. Packel: Of the what?

Mr. Paul: Of the magazine. Mr. Packwood can substantiate the foundation and the legitimacy of the

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magazine.

The Court: No, I think that is part of your case in chief. I would sustain the objection.

Mr. Paul: Sir, I would have no way of knowing prior that Mr. Packel would make obscenity an issue in this case. I didn't think it was an issue.

The Court: I think it is; at least I think, if not obscenity, certainly smut is an issue in this case. However, I will sustain the objection on two grounds; first of all, that I don't think it is proper rebuttal, and secondly, it

is only five minutes of 12:00 and we still have half an hour of court time to go.

Mr. Paul: I know. He should have been here.
(End of discussion at side bar.)

Mr. Paul: If Your Honor please, I can proceed no further. I have no other witnesses I can call at this time.

The Court: The plaintiff rests?

Mr. Paul: Yes.

The Court: All right, I suspect that you gentlemen would like to know how I am going to rule on your requests for charge before you make your closing addresses to

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the jury.

You are entitled to know that, of course, under the rules, and I guess you want to know that, do you?

Mr. Paul: Yes, sir.

Mr. Packel: I would think it is desirable, Your Honor.

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Mr. Paul:

Ladies and gentlemen of the jury: we now come to the final stages of the case and it is my opportunity to address you and sum up the plaintiff's position in the case from the evidence that you have heard, and I certainly hope I do a better job than I did when I opened my case.

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This case can go down as a landmark achievement for decent broadcasting and news dissemination. If I may I will read to you just as shortly as possible just what was said about Mr. Rosenbloom.

The first radio broadcast which we complained of was on October 4th, 1963, and here are the ones we complained of and you will have these scripts available to you in the jury room, all 21 of them, and not one article which appeared in the paper, which is black ink, and certainly I don't think that they meant to excuse their responsibility by saying somebody else did it so we can do it too.

Here is one publication. Here are 21 publications, and you know that just because somebody else hurts somebody that is no reason for somebody else to do the same thing, that both people are equally responsible.

In the first broadcast on October 4th, 1963, the article stated that the special investigation squad raided the home of George Rosenbloom in the 1800-block of Vesta Street this afternoon. Nobody is complaining about that. Mr. Rosenbloom was arrested and I can tell you that.

Mr. Rosenbloom did have a magistrate's hearing. We are not—it is the truth. Mr. Rosenbloom's books were seized, not confiscated, and returned later by the police as he testified. I think Mr. Ferguson—Captain Ferguson

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did.

There is no disagreement. That is fairly presented.

Police confiscated 1,000 allegedly obscene books. That may be pretty close, but the law may protect them on fair comment because they say they didn't say it is alleged, somebody else said it, and they described their source.

Police confiscated 1,000 allegedly obscene books. That senbloom's home and arrested him on charges of possession of obscene literature.

It is a crime to possess and distribute obscene literature and you know from Mr. Rosenbloom's testimony that those charges were not brought to fruition, he was released, and you are going to be asked to decide whether the book is obscene or not, or you may not be.

The special investigations squad also raided a barn in the 2000-block of Welsh Road near Bustleton Avenue and confiscated 3,000 obscene books.

Now, there they didn't say they were allegedly obscene; now the radio broadcasting station takes over and they say these 3,000 books are obscene, and don't let them put up any black ink and tell you that so what, 3,000 obscene books were taken out of a barn.

How do we know it was Mr. Rosenbloom's barn? You

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can tell from reading the entire context of that publication that they are talking about Mr Rosenbloom and they are talking about crime and the laws of Pennsylvania for which he was arrested, and anything else is silly, and they are telling it at a time when he is supposed to be standing a fair trial. They are telling the community these books are obscene, they are voicing their opinion, and they are responsible for that.

Now, I contend that that is libel, libel per se. Anything that ruins a man, anything that deters from a man's good name and reputation is defamation.

The tort, the civil wrong which we are discussing today is libel and libel per se, as His Honor may charge you, libel per se is the imputation of a crime, and per se means you don't have to prove special damages, they are presumed. You know somebody calls you a crook or thief or smut ped-

dler or girlie book peddler; you know that is going to do you damage.

If they say it to you directly and nobody else hears, that is not so bad, that is not even a tort, but when they tell the whole world, that is publication. That is what it is designed to do, and you know it is going to come to you, you know your feelings are going to be hurt, and you know you are going to have problems with your friends, your

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relatives, and people you will deal with. You know it. That is common sense. The law presumes it. You can see it and also you may know that if you libel a man, and radio broadcasting today is speech, and the law makes an exception; it says it is so grave that it is libel.

Libel usually refers to the written word. Slander refers to the verbal or the oral word, but radio broadcasting, though it is oral, the law says it is in the form of libel and if you hurt a man by libel in his business reputation, smut peddler, girlie book distributor, girlie book racket which you will hear later on, indicating this man is in the rackets, and that has a connotation that you are taking illicit money and using it for other devious means, that is a racketeer, and if you hurt a man in his business reputation that is libel per se without proof of special damages.

I don't say that; the law says that. His Honor may charge you to that effect. You know that a person is going to get hurt, and what we are asking you to do is to make this man whole again.

We are also asking you for punitive damages to punish not Mr. Rust, not Mr. Packel, but Metromedia, the defendant. They are the ones that are responsible and I am not trying to inflame or incite you, but you heard from the

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witness stand that that company was worth $100 million.

Now, I didn't have that elicited from the witness stand to make any false impression upon you. The law gave me that opportunity. I didn't want you to use that figure just to show that they have a lot of money, so how are they going to be hurt? That is nonsense.

That figure was elicited to demonstrate to you on the question of punitive damages so that you know how much you can punish these people, what will hurt them.

Punitive damages are sometimes referred to as "smart" money. Now, that is not smart in the sense of being smart, that is smart in the sense of pain-making. Your eyes smart; a tear comes out of your eyes, and punitive damages are used where they have been or where there has been malice directed toward the defendant; not necessarily overt malice, because your heard the testimony that nobody knew him. That is not the only type of malice. There could be implied malice also from what you do.

I don't have to know you to be malicious, and if I never saw you before and I just wheeled around and shot a shotgun into you and after you died, you don't think the law would punish me if I said well, there is no malice, I didn't even mean to shoot you?

I could say that but there is a grave consequence

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to my act and that radio broadcasting station is just like a cannon or a gun; it shoots its news information out into the community and it can do damage, and they can't be reckless with it.

They must be careful the way they impart news information and you can punish them if they weren't because you could say that was malicious.

Of course they didn't know Mr. Rosenbloom. They should have known Mr. Rosenbloom. In fairness they should have given Mr. Rosenbloom an opportunity to explain his position.

Is that what this country is getting down to, that juries are no good, courtrooms are no good, that what we are doing is trying cases in the radio broadcasting stations?

Is not a man presumed innocent until proven guilty? Has anybody the right to impart to the public, without paying his just due, that he is guilty before he gets a fair trial?

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If somebody says something to you on the radio do you think you are going to be able to get back on the radio station and say look, I want equal time? You are not the President of the United States, you are not in politics. They can ignore you. They don't have to give you equal time. There is no such law, but the law says you must treat individuals fairly in imparting the news.

Don't you think they should have called up and gotten his side of the story? You use your common sense and ask has that ever been done, accusing a man of having 3,000 obscene books, and you are telling the world don't deal with that fellow, he is a criminal, he is going to be prosecuted?

If you do that reputation will rub off on you or if you sell his merchandise you may be arrested and go to jail, and that is exactly what they said.

Now, "obscene" is an opinion, and a person is just as responsible for making false opinions about somebody as they are for giving you false facts. As a matter of fact it is more fair to give you a false fact because you can check it out, than a false opinion, because you can't get to somebody's opinion, and you either accept it or reject it, and when you

read the newspapers you accept all their opinions because it is gossipy; you may want to and it takes such a prominent place. It is designed to do that.

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That is why people pay good money for advertising; it is designed to attract your attention and to make you believe what they are saying.

Don't let Metromedia kid you. They are not only in business for disseminating news information to the public. Mr. Rosenbloom was honest with you and he has not been anything else but honest with you.

I asked him, "What was your purpose in bringing the suit in the Federal Court?"

He could have stood up like a big hero and said to you so all right, so I was protecting the country, I was protecting the people's rights to disseminate information, like every nudist, or anybody.

He never said that. He said he was interested in that and he was interested in making a profit too. Well, this is America, it is not Communist Russia, and you are entitled to make a profit.

That is the way our capitalistic system works and it works pretty good, because we are still in existence today, and not only that; our country says nobody is a censor but the marketplace is the censor, and these people had a right to be put out of business by the public if the public would not buy their magazines, him and his company, and he derives his income from this company, and the nudist

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people, which are a minority group, have a right to disseminate this information, as embarrassing as it may be to the public, and you and I will defend that right as Americans, as we do any minority group's right, and there are

more things more embarrassing than nudism in our country that exist today, and there are more things that should be taken off the streets than the thought of nudism.

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You know, we just talk loosely. Are you going to allow radio stations totalk loosely? Isn't that careless? Don't they have a higher duty in putting out news information? Nobody says they have to talk like lawyers, but shouldn't they be accurate?

My God, if you have got a piece of news that wasn't accurate couldn't it cause you to react in an improper way? Couldn't it affect the stock market?

If news was inaccurate couldn't it affect your

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daily life? It must be accurate. They have a high duty, a high responsibility. You have to impose it on them.

You don't have to, that is not the law, but what is your common understanding as to how they should act, and were they careless in imparting the news in the fashion in which they did?

Sure, the public has a right to know. That is what they are in business for, and the public wants to know. It is a good institution, it is a good invention. I want to know what people in California are doing, I want to know what people around the world are doing, and we are not downgrading the news media for giving us this information. We want the news media. It is vital.

That is what our country is based on, dissemination of information and the trading of ideas. Nudism is an idea. We can reject it or accept it, but it must be presented before us so that we can understand. If there is no white, how do we know, could we judge black if there is no white? How can we judge another color?

That is why in our constitution it says freedom of speech is very important to us. It gives us a chance to make up our own minds. We won't have Captain Ferguson making up our minds for us. We won't have WIP making up our minds for us; we will make it up ourselves. That is what America is

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all about, and that is what this business is of your right to know, accurately and fairly, and we don't want anything else, but we don't want to destroy their fair comment either because we believe it is necessary, but they abused it.

We want you to say so and we think they should be punished for saying it improperly.

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We don't ask you to pick out little things. It is their opinions and their misstatements which destroy their

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privileged information. If they merely said Captain Ferguson said, or what he did when this man was arrested, that would have been the end of the matter. The complaint was about 21 news broadcasts. They went beyond what they were supposed to do, and their little gems destroyed the entire context and meaning of the radio broadcast and ruined this man, those little gems that should not have been there.

Had they confined themselves properly and had not been careless, had some news reporter not rehashed what another had said and had verified it, and they could have called up the District Attorney's office. They said they didn't know how they verified it. Don't you think it would be proper and more due diligence to have some sort of records of who called up and how you verified the informa-

tion? As a matter of fact he testified they don't even have any policies; eight news broadcasters and they have no policy.

All the news that's fit to print? They just do whatever they want. They get a telephone call from somebody, they think it is news, they publish it regardless of whether they think it is true or not and hide behind what one man says, Captain Clarence Ferguson, who is now from his own words the censor of the community.

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If the Bulletin was libelous it doesn't excuse them. They are also responsible too. The Bulletin should be punished, and they should be punished. You just can't do things like that. It is your community and the community has to serve you.

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You are not dictated to by what they say and if we are going to be accurate, and Mr. Packel wants you to be accurate, then he should have the ability and the understanding, I am not knocking him, to know that the people that put these things out are not manufacturers, they are publishers, and manufacturers of books or whatever you call them is loose talk to you, just like the radio gave the public loose talk that ruined this man.

If I say as Mr. Packel says, and I am quoting, if some man is a crook, I don't say who he is, I am not responsible, but if you were standing on the corner of 10th and Chestnut at 9:00 o'clock in the morning and you had some notoriety and everybody knew you were standing there, and I say do you know that man was standing on the corner of 10th and Chestnut, everybody knows about him, he is a crook, that you can't hold me responsible because I didn't say who he was?

That is black ink, and the octopus is withdrawing, and there is where you can do a lot of damage, because the innuendoes and the inferences still apply. You can't escape the responsibilities because you make innuendoes and inferences. You are still responsible and you wouldn't have it any other way or else we would have a lot of defamation or a lot of lying in this country, if the law would allow

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that to exist.

I don't want you to reward Mr. Rosenbloom. I don't want you to reward me. I want you to return this man, make him whole again. That is what compensatory damages are. Put him back in the position that he was, as a respectable member of the community who will do some good in the community with whatever he has, with whatever you give him, and punish them, not for his sake because that is not what punitive damages are for; for our sakes, for the sake of the news media.

Tell them how they should act, that they should be fair, they should act accurately and give genuine, accurate news, and in punishing them you can make it smart.

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CHARGE OF THE COURT

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LORD, III, *J.*

Members of the jury, you have heard all of the evidence, you have heard the summations of counsel, and now you will hear me on the law applicable to the facts of this case. The facts of this case are as you find them. You are the sole and only judges of the facts, and you are the sole and only judges of what the testimony showed, the credibility of the witnesses, the inferences to be made from the testimony.

If any of the lawyers or if I should refer to the evidence in a way that does not agree with your recollection, first of all, I think you should regard any such reference or misreference as inadvertent and not as any intentional effort to mislead you, but secondly and more importantly, you must disregard any references that any of us might make that do not agree with your recollection of what the testimony was, or of what the facts are. This is only to emphasize the fact that you are the sole judges of the facts.

If I should refer to some of the testimony and not to other portions of the testimony, you are to attach no importance to that as indicating that I may think

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that some of the testimony is more important than other testimony.

In the first place, I don't, because all of the testimony is important, but in the second place, even if I did that is not important at all. You are the ones to decide what is the important testimony and what the testimony was.

I do not intend to narrate in detail the testimony of each witness. I may refer to the testimony to put into context the

rules of law that I give you, but again I emphasize that if I should omit reference to portions of the testimony, that is not of any significance whatsoever.

I have said that you are the sole judges of the credibility of the witnesses, and you are. In assessing the credibility of the witnesses you may wish to take into consideration certain criteria or standards or guides.

First is the interest that a witness may have in the outcome of the case. Certainly it can be said that Mr. Rosenbloom has an interest in the outcome of the case.

I think it could also fairly be said that Mr. Rust has an interest in the outcome of the case. He was the director of the news bureau, or the news section

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at WIP, and naturally he is interested that his department function properly and within the law.

The interest that a witness has may or may not tincture his testimony or his recollection. Sometimes people have a way of recollecting things the way they want them to be, and this is unconscious on their part. On the other hand, even the interest in the outcome of the case may have no effect whatsoever on the witness' testimony. It may be totally uncolored by any influence of interest in the outcome.

You should also consider whether or not the witness survived the rigors of cross-examination. Oftentimes a witness' story on direct examination will be easy to follow, logical and straightforward, but when subjected to the test of cross-examination it may not survive. This you will have to consider.

You should also consider whether there were any inconsistencies in the witness' testimony, either inconsistencies in his testimony in court as between cross-examination and direct examination, or inconsistencies as to what he said in court and what he may have said at another time. This

again may influence your judgment as to the credibility of the witness.

There has been reference made to a doctrine

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in the law known in Latin as falsis in uno, falsis in omnibus, which simply means false in one, false in all.

However, that is to be taken with great caution because the meaning of that doctrine is that if a witness wilfully and intentionally swears falsely to a material fact, you may disbelieve his entire testimony.

There are some important adjuncts in that rule of law. First of all the false swearing, if there is any, must be intentional and wilful and not mere inadvertence, lack of memory, lack of recall, or something of the sort; it must be wilful and intentional and it must be to a material fact, and finally the rule says that you may disregard his entire testimony, not that you must, only that you may.

The plaintiff in this case has the burden of proving his case by a preponderance of the evidence. By a preponderance of the evidence we mean that the plaintiff has the burden to convince you upon all the evidence before you that the facts asserted by him are more probably true than false.

To put it another way, if you were to image the grocer's scales that start out evenly balanced, the scale must tip in favor of the plaintiff. If you find that at the end of the case the scales remain evenly balanced

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or if they tip in favor of the defendent, then the plaintiff has not sustained his burden of proof.

On the other hand, if the scales tip lower in favor of the plaintiff, that is the plaintiff's side tips lower, then it

could fairly be said that the plaintiff has sustained his burden of proof by a preponderance of the evidence.

He need not of course convince you beyond a reasonable doubt. You may perhaps have heard that expression in connection with criminal cases. That is not the plaintiff's burden here. He need not convince you beyond a reasonable doubt but only by a preponderance of the evidence, as I have defined it for you.

The action here is one for defamation, and particularly for libel, which is the wrongful injury to another's character or reputation.

Defamation, or a defamatory statement, is one which tends to so harm the reputation of the subject of the statement as to lower him in the estimation of the community, or to deter third persons from dealing with or associating with him. That is a defamatory statement.

To give you an illustration, and I will come to this in a moment, the fact that the broadcast charged that the plaintiff in this case was arrested is in itself

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a defamatory statement. However, that statement is or may be privileged.

In other words, even though defamatory the plaintiff must go beyond that in order to establish the legal liability of the defendant, so that you can see, I think, what we mean when we refer to a defamatory statement.

The mere fact that a person is reported as having been arrested in itself could lower him in the estimation of the community, or could deter third persons from dealing with or associating with him. However, that is the central criterion with which we start.

The alleged defamatory statements in this case can conveniently, I think, be divided into two parts, and I think

the lawyers did that for you this morning; the first relating to the broadcasts at the beginning of October, the early ones which referred to the raid, the confiscation and the arrest; and the second group would be those referring to the action which this plaintiff here brought in this court which occurred toward the end of October.

The plaintiff claims that there were defamatory statements in both of these groups of broadcasts. Even though they are divided in this case into two readily ascertainable classifications, nevertheless the same principles of law are applicable to both, and you will have to consider those

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principles of law as applicable to both.

First of all, you must determine whether or not the statement was defamatory, and that will be for you to determine. I wouldn't think that you would have too much difficulty with that in the first group of broadcasts, accusing one, or not accusing one, of reporting and stating that a man was arrested with the possession of obscene literature.

It seems to me you would have no difficulty concluding it was defamatory in the sense in which I have defined it.

In the second group of broadcasts referring to the subject, whoever it was, as smut peddlers or girlie-book peddlers, I leave it to you whether that too isn't defamatory.

The second consideration that you must give is the question of identity; namely, whether or not the statement as uttered, heard by a reasonable person, could reasonably be taken to have referred to the plaintiff. Again I deal with the two groups of statements.

In the first group you will recall, and these statements will go out with you, the scripts of the broadcasts, you will recall that the script started out and the broadcast started out with the reference to the arrest of

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Mr. Rosenbloom and the raid on his home. There was then reference to a raid on a barn at a different location with no reference in that portion of it to Mr. Rosenbloom.

Now, if you conclude that a reasonable listener would not reasonably conclude that the second reference referred to Mr. Rosenbloom, then of course it would not be defamatory as to him. If you conclude, because of the concatenation of the article itself, that a reasonable listener would conclude that it referred to Mr. Rosenbloom, then you would go further and consider whether that is defamatory.

As to the second group of statements you have the same problem. It is true that there was no refrence by name or address or other identification to Mr. Rosenbloom as an individual or as a proprietor of a partnership. You will also remember that there was a lapse of time between the first statements and the second group of statements.

Was that such, was that lapse of time such, was the failure to mention Mr. Rosenbloom by name such that a reasonable listener would not reasonably conclude that these broadcasts referred to Mr. Rosenbloom, who was also referred to in the first set of broadcasts, or would the similarity of subject matter, would be the circumstances lead

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a reasonable listener to conclude reasonably that although not identified by name, that the second group of broadcasts nevertheless also referred to Mr. Rosenbloom? This you will have to determine.

The third matter that you will have to consider is the question of privilege. A news medium has a privilege to report and comment upon the news. It is not an absolute

privilege, and by privilege we mean in essence a protection or a right.

A news medium has a right to comment upon the news or to report the news. A news medium in particular has the right to report official proceedings, which these were, both of them, official proceedings, so long as it does so fairly and accurately, and so long as there is no intention to injure the plaintiff personally, and so long as that privilege is exercised reasonably and with reasonable care.

To give you an illustration the first sentence of the first broadcast was to the effect again that the raid was conducted, that Mr. Rosenbloom was arrsted, and that some one thousand allegedly obscene magazines were confiscated.

Now, the news medium is privileged to report that, even though as I said that is defamatory in the sense in which I have described it to you; namely, a lowering of the reputation in the eyes of the community.

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The news medium has the privilege to report that but the news medium must do so in the exercise of reasonable care and check its accuracy and determine whether or not it is true or false.

You have heard what was done here. Apparently it was checked at the source with Captain Ferguson. Should the defendant have gone further, or should it not? Was it exercising reasonable care?

We come to the second sentence in that, however, and you will remember there that it described the raid on the barn and again you will have these before you; it described the raid on the barn and told how three thousand obscene books were seized.

Here was not the use of the word "allegedly." This was apparently, or you could so find, the expression of the station's conclusion.

You may also find from the connection that this was merely a repetition of Captain Ferguson's allegation and if that is so, then that is privileged in the same way that the first one was, but if it was the station's own characterization of the nature of the books, then you will say to yourself did they exceed, did the station exceed the bounds of reasonableness by characterizing these books as obscene in itself, without finding out whether

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they were or were not in fact obscene, and the same holds true for the statement and the broadcasts about the proceeding here.

You will remember that the later broadcasts referred to the plaintiffs in that case, not by name, but referred to them as smut peddlers and girlie-book peddlers.

Well, did the station in so characterizing them exceed the bounds of reasonableness? Should the station have checked to find out whether they were in fact girlie magazines, whether they were in fact smut, and there is another thing that you will want to consider in connection with the second group of broadcasts.

There was I think some reference to the fact that the plaintiffs in that case were seeking to enjoin raids on smut. I think if you will examine the complaint that was not so; they were merely seeking to enjoin the raids on their own materials which they say were not smut.

Did the station exceed the bounds of reasonableness in so reporting? If it did then its privilege disappears and the statement becomes actionable. If it did not, then its privilege remains, but there is the burden upon the defendant to use reasonable diligence, to ascertain the truth or falsity of the utterances which emanate from its studios, and if it fails to do so then the defamation, if you find that it was a defamation, will be actionable.

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Finally you come to the question of truth, and that is whether or not the statement, even though defamatory and even though identifiable to the plaintiff himself, were true or not. This will be for you to determine.

Going now to the first series of broadcasts about the arrest, the raid and the confiscation, I refer again to the characterization by the defendant of these books, or these magazines as obscene. That word may have been used in one of two ways by the broadcasting company.

The lawyers have discussed this with you, and I am going to leave it to you. That may have been used in the legal sense, in the sense of a violation of a statute or a law. If that is the way it was used, I charge you as a matter of law that this book or this magazine would not be obscene under the standards of the criminal statutes which govern obscenity, and if that were so, if that were the way the word was used, then the allegation or the characterization would have been in fact false or incorrect.

In other words, if you find that WIP used the word "obscene" as meaning a violation of the statute, then its characterization was wrong and false, and if it had not waived its privilege, or rather, if it had waived its privilege

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by not having taken further steps to find out whether that was a sound allegation or not, and if it was defamatory and identifiable to the plaintiff, then that would be actionable.

If you find that the broadcasts used the word not in its legal sense, as meaning a violation of a criminal statute, but merely in its ordinary, everyday sense, then I leave it to you as to whether or not it was true. I leave it to you as to whether or not this magazine in the ordinary day-to-day

sense, if that is the way in which the word was used, whether or not this magazine was obscene in that sense.

You have heard the arguments on both sides as to that. You have heard the one argument that this was filth, that it was smut, that it was obscene. You have heard the other argument that this is merely an expression, in effect, of a nudist camp or of a nudist way of life, a way of life that is not illegal, and the argument being that even though you don't agree with that way of life, that these people have a right to project their own way of life.

Again there has been characterization in the second group of broadcasts of smut and girlie magazines. Now, unlike the definition of the word "obscenity," there is no statute, and so far as I know no case, which defines "girlie magazine" or "smut." I am not at all sure that I

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know the definition of it, but at all events you will have to do the best you can with that. You will have to determine whether this is a girlie magazine or whether this is smut.

We had some testimony I think from Mr. Rosenbloom defining girlie magazines, and what he called illegitimate magazines, and he contrasted those with this magazine that he distributed. It will be for you to determine whether or not this was or was not a girlie magazine or smut.

If you find that it was then the allegations or the comment and the reporting was true, then that would be a defense. If you find that it was not and if you find that the defendant waived its privilege by its failure to exercise proper care and by excessive comment, if you find that it was excessive, and if you find that this is identifiable to the plaintiff as I have previously outlined, and if you find that it was defamatory, and again I think you will have no trouble with that, then it would be actionable and your verdict should be for the plaintiff.

The mere slight inaccuracies in reporting does not make for actionable libel.

You have heard reference to the fact that this original case, this original federal case, rather, was before Judge Joseph Lord, and you have heard my repeated

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assurances that it was not, that it was before Judge John Lord.

Well, I take no umbrage at that and I think that is a mere inaccuracy in reporting which I think would not be libelous or defamatory. It may be some evidence of the thoroughness of the defendant's checking on its sources, but that would be again for you, but as I emphasized, mere slight inaccuracies, immaterial inaccuracies, do not necessarily make or do not make a statement actionable as far as this plaintiff is concerned.

If you find in favor of the plaintiff, if you find—and let me sum up aagin; you must find that the statement was defamatory, you must find that it was reasonably identifiable to the plaintiff by the listeners, a reasonable listener, you must find that the privilege of reporting had been so abused by excessiveness or by lack of care that the privilege was waived or forfeited, and you must finally find that the statement was untrue.

All of those four things you must find before you find in favor of the plaintiff, as to either or both sets of broadcasts. If you don't find all four of those things, then your verdict must be for the defendant.

Bear in mind that you can find all four of those things as to the first set and not as to the second set;

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you can find all four of those things as to the second set and not as to the first set; you can find all four of those things as

to both sets, or you can find that none of those things apply to either set.

If you find those four things as to either set or both of the broadcasts, then your verdict must be for the plaintiff. If you do not find all four, all four, not just one or two, but all four of those items as to either set of broadcasts, then your verdict must be for the defendant; and to go over once again at the risk of being both repetitious and boring but because I know that this is a new field to all of you, and unfamiliar, the statement must be defamatory, it must be identifiable reasonably to the plaintiff, the privilege must have been so abused as to have been forfeited, and the statement must not have been true, or false.

These are the four that you must find if you are to find for the plaintiff.

If you find in favor of the plaintiff you then come to the issue of damages. There has been some evidence here as to the loss of business which the plaintiff says he sustained as a result of these broadcasts. I have considered that carefully and I charge you as a matter of law that that is not a recoverable item of damage; not because it wouldn't ordinarily be but because there has been

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evidence that this same subject matter was the subject of news broadcasts over television and the subject matter of newspaper reports in the Inquirer, the Bulletin and the Daily News, and so if there was any business lost, specific business, we have no proof as I see it here that resulted directly from the broadcasts by WIP and not perhaps from the acquisition of that knowledge by potential customers from other news media.

However, the mere fact that the plaintiff has proven no special damages does not mean that he is not entitled to recover, and by special damages we mean damages that are

more or less fixed and directly attributable to a loss of business.

The mere fact that he has not proven that does not mean that he is not entitled to a verdict, because he is. He would be entitled to what the law knows as general damages, and as to this I can give you and the plaintiff can give you and nobody can give you any fixed criterion as to amount.

However, in considering general damages you should consider the character of the plaintiff, his general standing in the community, the character of the defamatory publication, its seriousness, the seriousness of the charge, the probable effect as opposed to the proven effect.

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In other words, the plaintiff has testified here as to certain effects that it had on him, that he became extremely nervous, extremely irritable, that he was unable to control his appetite, and that is not unreal, or to control his weight, that he has lost friends. These may be the proven effects, if you believe that, and believe that they resulted from the libel, if you find that there was such, but you would also be entitled to award compensation for whatever probable effects you find might flow.

You would be entitled to consider the extent of the area of dissemination of the news broadcasts, and here I think there was some testimony that the station was received as far west as Harrisburg and as far north and east as Trenton. You would consider that.

You would consider the duration of the publications, and by publications I refer to the broadcasts, and you will remember that these went on for several days at varying intervals.

You would also be entitled to consider the fact that the plaintiff was engaged in a business, and you may consider that in estimating the harm which he may have sustained

s a result of the libel, if you find that there was a libel nder the terms that I have given you.

All of these are factors for you to consider

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n awarding general damages. Bear in mind you are not warding him anything for any loss of business, but these re simply damages that are presumed to flow or which you an find would flow, rather, from the very fact of the publica-on of a libel, if you find that there was such, and he would e entitled to money damages at your hands, what you con-der to be fair and adequate compensation.

Secondly, if you find that this publication arose from a ad motive or malice toward the plaintiff, or if you find that was published with reckless indifference to the truth, if ou find that it was not true, you would be entitled to award unitive damages, and punitive damages are awarded as a eterrent from future conduct of the same sort.

They really are awarded only for outrageous conduct, s I have said, with a bad motive or with reckless disregard f the interests of others, and before you would award puni-ve damages you must find that these broadcasts were pub-shed with a bad motive or with reckless disregard of the ghts of others, or reckless indifference to the rights of thers; so that your verdict should be, if you find for the laintiff, in two parts; one, general damages, and, two, puni-ve damages.

If you find for the plaintiff those two amounts

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ould be brought in separately.

Now, the mere fact that I have charged you on damages oes not mean that I think there should be a verdict for the aintiff. The mere fact that I charge you on punitive dam-ges does not mean that I think you must find punitive dam-

ages. The mere fact that I mention this does not mean that I think there should not be a verdict for the plaintiff. I have no thoughts on that one way or the other. The charge on damages is a part of the law that I must give you, and even if I had any thoughts on that one way or the other, they are immaterial because it is your thoughts, your conclusions alone which are determinative in this case.

I have stressed that you are the sole judges of the facts. By the same token you must take the law from me as I give it. You may disagree with what I say the law is. You may not like what I say the law is. Be that as it may, you must accept it as I give it to you.

You may think I am wrong about what the law is. Be that as it may, you still must accept it, secure in the knowledge that if I am wrong there is another court above me who will waste no time in correcting my error, if any I made.

Your verdict must be unanimous.

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I will now excuse the jury and hear counsel on any exceptions. Would you take the jury out?

Members of the jury, so that you will know what is going on, counsel have a right to disagree with me. They can't do much about it but they have a right to disagree with me and therefore when they do they have to put that on the record. That should be done out of the hearing of the jury.

(Jury out at 2:22 P. M.)

The Court: Mr. Paul, I will hear you.

Mr. Paul: Sir, I would take exception to your charge to the jury and request that you charge additionally in the area in which you excluded special damages, the loss of

business, because of the introduction of evidence tending to show that other news media may have possibly defamed the plaintiff and therefore his losses were not traceable to WIP.

The Court: I have your point. I will grant you an exception.

Mr. Paul: Further, Your Honor, I would ask you to charge the jury in the area of punitive damages that they necessarily—might not necessarily flow from the term

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"outrageous conduct"; but that malice may be equivalent to that outrageous conduct, and that in accordance with some of my charges malice can be implied from libel per se.

The Court: I will grant you an exception.

Mr. Paul: Your Honor, I would ask the Court a question.

In reference to the points does Your Honor require me to refer to each point as I have made it here, or just generally?

I notice Your Honor hasn't charged the way I have requested; therefore you are denying the points for charge, basically the ones I just made?

The Court: Well, I think that I covered all of your points for charge that I felt were appropriate to this case.

I did not want to read American Jurisprudence to the jury and I know that that is where your points for charge came from. I say that not critically but if you think there is anything that is essential that I haven't covered, I think you had better call it to my attention.

Mr. Paul: Yes, sir. I would request that Point 40 be charged, Your Honor.

The Court: Just a minute. I will charge on that.

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I think it might have a tendency to confuse the jury. If you want me to charge on it, I will, but I think it might confuse the jury.

Mr. Paul: I did mention it in my summation, Your Honor. I alluded to it.

The Court: All right, I will cover that.

Mr. Paul: I would request that Point 26 be charged also, Your Honor.

The Court: No, I think I have covered that. I will refuse that and grant you an exception.

Mr. Paul: Would Your Honor grant me a general exception to the points I have requested?

The Court: No.

Mr. Paul: Would Your Honor charge the jury that the wealth of the defendant—

The Court: Oh, yes.

Mr. Paul: —the wealth of the defendant should be taken into consideration in assessing punitive damages.

The Court: I shall.

Mr. Paul: Thank you, Your Honor.

The Court: Mr. Packel?

Mr. Packel: In view of the discussion in chambers about the dictum in 3 Supreme Court United States

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cases I ask for an exception with respect to my Points 8, 9, 10, and 12 which relate to that, and I also ask for an exception to your charge with respect to reasonable care.

The Court: Yes, I will grant you an exception.

Mr. Packel: We discussed this in chambers.

The Court: Yes, that is correct. I will grant you an exception.

Mr. Packel: And I am not sure you heard. I also asked for an exception with respect to your charge about reasonable care.

The Court: Yes.

Mr. Packel: Rather than a higher—rather than a more, a greater—

The Court: Burden?

Mr. Packel: —burden.

The Court: Yes, I understand your position.

Mr. Packel: I think it might be desirable and I ask that you charge the jury about who has the burden of proof, and my position is that as far as defamation to the plaintiff, the plaintiff has the burden of proof.

As to the truth, we have the burden of proof. As to abuse of privilege, they have the burden of proof.

The Court: I have already written that down because I know I omitted it.

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Mr. Packel: Right. I ask that you charge Point 11 dealing with Mr. Chuse, in my points, No. 11.

The Court: No, I will deny that and grant you an exception.

Mr. Packel: Then I ask for an exception to your charge with respect to punitive damages because I do not think this

is a case in which there were facts for the jury to consider, as to whether it is appropriate for punitive damages.

The Court: I will grant you an exception.

Mr. Packel: That's all, Your Honor.

The Court: Thank you.

Mr. Paul: May I be heard one moment? My associate informs me that—I didn't mean to mislead the Court. What I should have requested before was not a general exception to my points for charge but a general exception to your charge; not for my points but just a general exception to your charge.

The Court: Denied.

Mr. Paul: Sir, one other point for Your Honor's consideration. In Your Honor's discussion of the facts you left it with the jury to determine whether the magazines confiscated in the barn, whether the barn was associated with Mr. Rosenbloom.

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I noticed in reading the scripts this morning that special reference in one of the broadcasts does directly associate Mr. Rosenbloom with the barn. I just came to it, it is about four down, and if Your Honor will not make specific reference to it, would Your Honor indicate to the jury that it is for them to read what was said?

The Court: I see that broadcast that you are referring to. That is October 4, 1963 at 11:00 P. M., although it is—it refers to a barn that Nester rented on Welsh Road.

Mr. Paul: If Your Honor will indulge me one moment I thought I saw it here.

It said, sir, on the 10-5-63 at 8:00 A.M., the last paragraph, it indicates—

The Court: Yes, I see it. Yes, all right.

Mr. Paul: Thank you, sir.

Mr. Packel: One other thought occurs to me, Your Honor. We had discussed this in chambers.

I do want also an exception as to your stating as a matter of law the magazine was not obscene.

The Court: Yes, you may have an exception.

Bring the jury in.

Mr. Packel: That the magazine was obscene.

The Court: Was not.

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Mr. Packel: I am sorry, yes.

(Jury in at 2:35 P. M.)

The Court: The plaintiff has asked me to charge, and I do, and I affirm this point for charge of the plaintiff: one who publishes both privileged and unprivileged matter concerning another is not relieved from liability for damages by the fact that there is no exact method of determining the quantum of injury attributable to the latter, the latter being the unprivileged matter.

That takes care of that, Mr. Paul.

Mr. Paul: Thank you, sir.

The Court: Secondly, let me be a little bit more explicit on the burden of proof.

I have told you that the party having the burden of proof must sustain it by a preponderance of the evidence, as I have defined it to you. The plaintiff has the burden of proving the defamatory nature of the statement. The plaintiff has the burden of proving that it is identifiable, reasonably, to the plaintiff. The plaintiff has the burden of proving that the privilege was so exercised or so abused that it was forfeited. That is the plaintiff's burden of proof.

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The defendant has the burden of proving the truth of the assertions made, by the same preponderance of the evidence that the plaintiff bears in relation to those factors which he must prove by a fair preponderance of the evidence.

Finally, or not quite finally, if you assess punitive damages, if you do come to that point, then the wealth, the financial worth of the defendant should be considered by you or may be considered by you in determining the amount of the punitive damages, if you so award them.

Obviously a man who is worth $10 would be hurt badly by a $10 award. A man that is worth $10,000 wouldn't be punished nearly so severely.

This is a matter, if you award punitive damages, for you to consider.

Finally the plaintiff has asked me to instruct you to read the scripts which will be available to you in determining whether or not the scripts are identifiable to the plaintiff, and he has called my attention to the fact that in one broadcast the script read that at the same time the squad also raided a barn Nester rented on Welsh Road.

You make out of that what you will. I believe it is obviously wrong because Mr. Rosenbloom lived in the

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1800 block on Nester Street, but it says Nester rented, and further on it said that he was rearrested after several thousand copies of allegedly smutty periodicals were confiscated from his apartment and a nearby barn.

These are factors for you to consider in the question of whether they were identifiable to the plaintiff.

Does that take care of your exceptions?

Mr. Packel: Thank you, sir. Except as to the last one.

Did you make clear this was several days after the other references to the barn?

The Court: Yes, it was. This was several days after. You will see those on the scripts. You will see those. It was, it was on October 5.

All right, is there anything else?

Mr. Paul: No, Your Honor.

Mr. Packel: No, Your Honor.

The Court: Thank you. All right, will the Marshal come forward?

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MORNING SESSION

The Court: Good-morning. Jurior No. 1, has anyone talked to you about this case or have you talked to anyone about it?

Juror No. 1: No, Your Honor.

The Court: Juror No. 2, has anyone talked to you or have you talked to anyone about the case?

Juror No. 2: No, Your Honor.

The Court: Juror No. 3?

Juror No. 3: No, sir.

The Court: Juror No. 4?

Juror No. 4: No, sir.

The Court: Juror No. 5?

Juror No. 5: No, Your Honor.

The Court: Juror No. 6?

Juror No. 6: No, sir.

The Court: Juror No. 7?

Juror No. 7: No, Your Honor.

The Court: Juror No. 8?

Juror No. 8: No, Your Honor.

The Court: Juror No. 9?

Juror No. 9: No, Your Honor.

The Court: Juror No. 10?

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Juror No. 10: No, Your Honor.

The Court: Juror No. 11?

Juror No. 11: No, sir.

The Court: Juror No. 12?

Juror No. 12: No, Your Honor.

The Court: Thank you very much. You may now retire for further deliberation.

(Jury out at 10:03 A. M.)

(Jury in at 4:45 P. M.)

The Court: The jury can remain standing.

The Clerk: (Mr. Spitz) Members of the jury, have you agreed upon your verdict?

The Forelady: We have.

The Clerk: Will the Forelady of the jury please answer the following questions.

Do you find for the plaintiff or for the defendant?

The Forelady: We find for the plaintiff.

The Clerk: How do you assess the damages under general damages?

The Forelady: We award general damages in the amount of $25,000.

The Clerk: How do you assess punitive damages?

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The Forelady: We award punitive damages in the amount of $725—$725,000, excuse me.

Mr. Packel: I ask that the jury be polled individually.

The Court: Very well, you may be seated, members of the jury.

The Clerk: Will the Forelady please remain standing? Do you find for the plaintiff or for the defendant? I am going to ask you individually.

Juror No. 1: I found—

The Clerk: Yes?

Juror No. 1: —for the plaintiff.

The Clerk: And how do you assess the general damages?

Juror No. 1: How do I assess them? $25,000.

The Court: That's right. In what amount do you assess—

The Clerk: In what amount do you find punitive damages?

Juror No. 1: $725,000.

The Clerk: Please be seated.

Juror No. 2, please rise.

Your Honor, can I ask if they find that the verdict recorded is their verdict?

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The Court: Is that agreeable?

Mr. Packel: I am sorry, I didn't get the question.

The Court: The Clerk wants to know if he can ask if the verdict recorded is their verdict?

Mr. Packel: Oh, no. I would rather each be polled individually.

The Clerk: Juror No. 2, do you find for the plaintiff or for the defendant?

Juror No. 2: For the plaintiff.

The Clerk: How do you assess the general damages?

Juror No. 2: $25,000 for the general.

The Clerk: How do you assess the punitive damages?

Juror No. 2: And $725,000.

The Clerk: Please be seated.

Juror No. 3, please rise.

How say you; do you find for the plaintiff or for the defendant?

Juror No. 3: We—I found for the plaintiff.

The Clerk: How do you assess the general damages?

Juror No. 3: $25,000.

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The Clerk: How do you assess the punitive damages?

Juror No. 3: At $725,000.

The Clerk: Please be seated.

Juror No. 4, please rise. Do you find for the plaintiff or for the defendant?

Juror No. 4: The plaintiff.

The Clerk: How do you assess the general damages?

Juror No. 4: $25,000.

The Clerk: And how do you assess the punitive damages?

Juror No. 4: $725,000.

The Clerk: Please be seated.

Juror No. 5, please rise. Do you find for the plaintiff or for the defendant?

Juror No. 5: I find for the plaintiff.

The Clerk: How do you assess the general damages?

Juror No. 5: In the amount of $25,000.

The Clerk: How do you assess the punitive damages?

Juror No. 5: In the amount of $725,000.

The Clerk: Please be seated.

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Juror No. 6, how say you; do you find for the plaintiff or for the defendant?

Juror No. 6: I find for the plaintiff.

The Clerk: How do you assess the general damages?

Juror No. 6: The general damages, $25,000.

The Clerk: And how do you assess the punitive damages?

Juror No. 6: Punitive damages, $725,000.

The Clerk: Please be seated.

Juror No. 7, please rise. Do you find for the plaintiff or the defandant?

Juror No. 7: I find for the plaintiff.

The Clerk: How do you assess the general damages?

Juror No. 7: At $25,000.

The Clerk: And how do you assess the punitive damages?

Juror No. 7: $725,000.

The Clerk: Please be seated.

Juror No. 8, please rise. Do you find for the plaintiff or for the defendant?

Juror No. 8: I find for the plaintiff.

The Clerk: How do you assess the general

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damages?

Juror No. 8: $25,000.

The Clerk: And how do you assess the punitive damages?

Juror No. 8: $725,000.

The Clerk: Please be seated.

Juror No. 9, please rise. Do you find for the plaintiff or for the defendant?

Juror No. 9: For the plaintiff.

The Clerk: How do you assess the general damages?

Juror No. 9: $25,000.

The Clerk: And how do you assess the punitive damages?

Juror No. 9: $725,000.

The Clerk: Please be seated.

Juror No. 10, please rise. Do you find for the plaintiff or for the defendant?

Juror No. 10: The plaintiff.

The Clerk: And how do you assess the general damages?

Juror No. 10: At $25,000.

The Clerk: And how do you assess the punitive damages?

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Juror No. 10: $725,000.

The Clerk: Please be seated.

Juror No. 11, please rise. Do you find for the plaintiff or for the defendant?

Juror No. 11: For the plaintiff.

The Court: And how do you assess the general damages?

Juror No. 11: $25,000.

The Clerk: And how do you assess the punitive damages?

Juror No. 11: $725,000.

The Clerk: Please be seated.

Juror No. 12, please rise. Do you find for the plaintiff or for the defendant?

Juror No. 12: The plaintiff.

The Clerk: And how do you assess the general damages?

Juror No. 12: $25,000.

The Clerk: And how do you assess the punitive damages?

Juror No. 12: $725,000.

The Clerk: Please be seated.

The Court: Record the verdict.

The Clerk: Members of the jury, will you

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please rise?

Members of the jury, hearken to your verdict as the court has recorded it. In this issue joined wherein George R. Rosenbloom is plaintiff and Metromedia, Inc., is defendant, you find for the plaintiff and assess the general damages at $25,000 and assess the punitive damages at $725,000, and so say you all?

(The jury indicated affirmatively.)

The Clerk: Will you please be seated.

The Court: Members of the jury, I think this is your last day of service, is it not?

(The jury indicated affirmatively.)

The Court: I think I would be derelict if I first of all did not thank you for your service as jurors. I know that with many of you it meant taking time out from busy lives and possibly inconvenience, and yet you were willing to come in and devote your time and your energies to this service.

I feel personally that jury service is a rather exalted thing because without it we could not have the type of justice that we so much treasure in this country. You are indeed truly a part, a very important part, of the administration of justice, particularly of the administration of justice in the Federal Court.

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It is a duty. I hope that in light of what I have said that you will not only regard it as a duty but that you will look back on it as a privilege, of having been a true part of the administration of justice.

In particular I would like to thank you for your service in this case. In 25 years as a practicing lawyer and over six years as a judge I seriously doubt that I have ever in my life seen a more conscientious jury than you have been. You were willing to deliberate even I know to the extent of missing trains, probably, and again I say I cannot thank you enough nor can I compliment you enough on your dedication and conscientiousness.

You go now and you are excused, not only with my thanks but the thanks of the Court and the thanks of the Government of the United States.

Good-night. We will recess.

* * *

EXHIBIT P-1

5 Minute Newscast, 6 P.M., 10/4/63

(Washington)—British Foreign Secretary Lord Home (HEWN) conferred with President Kennedy today . . . and later said "The Free World can gain comfort" from current East-West talks on the Cold War. Home said recent talks with the Russians at the U-N indicated that "the Russians want agreements" . . . and that they now realize negotiations are better than force.

The Special Investigations Squad raided the home of George Rosenbloom in the 1800 block of Vesta Street this afternoon. Police confiscated 1,000 allegedly obscene books at Rosenbloom's home and arrested him on charges of possession of obscene literature. The Special Investigations Squad also raided a barn in the 20 Hundred block of Welsh Road near Bustleton Avenue and confiscated 3,000 obscene books. Capt. Ferguson says he believes they have hit the supply of a main distributor of obscene material in Philadelphia.

A jury of six men and six women found 16-year-old Russell Ott guilty of the murder of a Phila. shoe store operator last year, but could not decide on a verdict: both the district attorney and the judge recommended a life sentence: when the jury could not break the deadlock on the decision of verdict, Judge Joseph Sloan held a conference with attorneys from both sides, and then decided to impose a life sentence, subject to motions for a new trial from the defense:

Two men were released in bail totaling 35-thousand dollars today, following interception of a shipment of what was termed the worst type of pornographic material conceived: Russell LaBue was released in 25-thousand dollars

bond.... John Borozzi in ten-thousand dollars ... pending action by the Grand jury: Both men are from Baltimore:

Federal mediators and negotiators from both sides in the Phila. Hotel Employees strike are still in session at this hour, with no report of progress as yet:

Cong. Jack Brooks says: "The Federal Aviation Agency (FAA) is planning a new program of unannounced airliner cockpit inspections to check on "crew alertness."

Brooks said this was one of several steps promised in a letter from FAA Administrator Najeeb Halaby as a result of an airline safety investigation conducted last year by Brooks' House Subcommittee.

(UPI)—Police halted a mass march on Orangeburg's business district this afternoon and arrested 322 Negro anti-segregation demonstrators.

Scores of police had been alerted for the march and they intercepted the Negroes two blocks from the downtown area.

The Negroes offered no resistance and police steered them a block in another direction to the county jail.

The arrests brought to 1,325 those arrested in Civil Rights demonstrations here since Saturday.

EXHIBIT P-2

5 Minute Newscast, 6:30 P.M., 10/4/63

Miami, Oct. 4 (UPI)—Rampaging hurricane Flora crashed through Eastern Cuba's mountains into the Atlantic Ocean tonight, then set a course toward the Bahama Islands with rebuilding 115-mile-an-hour fury.

The weather bureau said chances of Flora's lethal center reaching the South Florida coast were "considered less than 50 per cent," but Florida coastal interests were advised to keep in touch with further advisories.

On its pass over Eastern Cuba, the storm hit the big U.S. Naval Base at Guantanamo Bay a glancing blow, but no damage was reported.

Residents of the Western and Central Bahamas were warned to batten down for the big storm's approach.

The Miami Weather Bureau in a 5 P.M., EST, advisory located Flora near Latitude 20.7 North, Longitude 75.2 West, or just on the North Coast of Cuba, 55 miles North of the huge "Gitmo" Navy Base and about 500 miles Southeast of Miami.

The hurricane was moving toward the North-Northwest at about 10 MPH, its highest winds estimated at about 115 MPH after the bout with the mountains of Cuba's Oriente Province.

But the Weather Bureau said Flora should re-intensify quickly and continue North-Northwestward.

"The center of Hurricane Flora should pass near the ragged islands tonight and approach the area between Southern Andros and Great Exuma tomorrow," the Weather Bureau said.

16 year old Russell Ott was convicted today of first degree murder for beating to death 75 year old Louis Goldstein in a Shoe Store on Kensington Avenue in August of

1962. . . . When the jury returned the verdict both Judge Sloane and the District Attorney asked the jury to bring back a sentence of life in prison. The jury however became deadlocked and Judge Sloan dismissed them. Judge Sloan then withheld imposing the sentence of life in prison on Ott until his attorney has had an opportunity to appeal the verdict. . . .

Talks continued this afternoon to settle the strike of nine Philadelphia Hotels and four Motor Inns by the Hotel, Motel and Club Workers Union. All of the hotels are operating but without the services of Bellhops, Chambermaids, Restaurant and Bar Services.

Judge Guerin set extremely high bail today in the case of two men who were picked up today by police with three boxes of what the district attorney's office called hard core pornography . . . Russell LaBue was charged with allegedly distributing pornography—had bail set at $25,000 and bail was set at $10,000 for John Brozzi.

Captain Clarence Ferguson's Special Investigations Squad this afternon raided the home of George Rosenbloom in the 1800 Block of Vesta Street and confiscated 1,000 allegedly obscene books. Rosenbloom was arrested and will be given a hearing tomorrow in Magistrate Raymond Malone's Court. Rosenbloom is free on bail at the present time from a previous charge of distributing obscene material. The Special Investigations Squad also raided a barn in the 20 Hundred Block of Welsh Road near Bustleton Avenue and confiscated another 3,000 obscene books. Police believe they have hit the supply of a major distributor of obscene literature in Philadelphia.

Birmingham, Ala., Oct. 4 (UPI)—President Kennedy's two-man racial fact-finding team completed its mission in Birmingham today and said it would submit a report to the White House "in a few days."

Announcement of completion of the task came shortly before a meeting of a 25-member community affairs committee—the first bi-racial body sanctioned by the city.

Washington, Oct. 4 (UPI)—The female chairman of a House Consumers Subcommittee announced today she will take a sharp look at sugar prices that shot upward recently even though large supplies are on hand.

Rep. Leonor K. Sullivan, D-Mo., said she would ask representatives of the sugar industry to explain the situation at hearings later this month.

The increase thus far has apparently been confined to raw sugar prices. They have risen from 6.5 cents a pound a month ago to 8.02 cents on Sept. 25 and 8.5 cents on Oct. 2.

The Agriculture Department said the recent Soviet deal to buy $500 million worth of wheat from Canada was a factor in the price jump.

A department statement explained: "This news spurred the advance in sugar values on the theory that if the grain crop was damaged, the sugar beet crop also may have suffered."

EXHIBIT P-3

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5 Minute Newscast, 8 P.M., 10/4/63

(Washington)—Secretary of State Dean Rusk says the United States is withdrawing all of its military and economic aid personnel from Honduras and the Dominican Republic. Washington has suspended relations and economic aid to both countries following military takeovers. An announcement by the State Department says existing conditions in Honduras and the Dominican Republic make it impossible for the United States to work with the two nations within the framework of the Alliance for Progress.

In other events revealing the troubled state of Latin America. . . .

Brazil's President Goulart (Goo-Lahr') today asked his congress for a 30-day state of siege to help him cope with a wave of strikes and general unrest in the country. Four key cities are involved in strikes, including Brasilia, the Capital. The military is backing Goulart's stand and has imposed "precautionary" measures in some areas.

Venezuela has tightened control on the nation's Communists and Extreme Leftists. Communist party offices were closed and the government moved to snuff out long-smouldering terrorism by pro-Castro elements. Shoot-to-kill orders are out for such saboteurs and already-strong police patrols have been stepped up.

In the WIP area . . . Capt. Clarence Ferguson of the Special Investigations Squad reported the arrest of 42-year-old George Rosenbloom of 1852 Nester Street this afternoon, on charges of possessing obscene literature: more than four thousand reportedly obscene books were picked up during this afternoon's raid on Rosenbloom's home, and from a large barn, which he rents: Capt. Ferguson said the suspect

was a source of supply . . . one of the main distributors of the literature: This arrest follows the confiscation earlier today, of what attorneys called "hard core" pornography, from two Baltimore men . . . John Brozzi and Russell LaBue: LaBue and Brozzi were released in bail totaling 35-thousand dollars:

The Sept. Session of the Phila. Grand Jury today chided the Commonwealth, for reportedly rating the welfare of trees and animals, over that of children: The jurors had turned in a report to Judge Gerald L. Gleason, which stated, in part, that the State spends more money for the preservation of deer and the health and welfare of trees, than it does for providing social workers, psychologists, psychiatrists, and space for delinquent children: The report went on to say that all creatures are important, including deer and trees . . . but children are most important: The jury noted the overcrowded conditions at the Youth Study Center:

In City Political doings . . . the number of Democrats eligible to vote in the Nov. 5th elections is well above that for Republicans, according to figures released by the Registration Commission today: In fact, the Republican Party total of 370-thousand is the lowest in modern history, for a General Election:

EXHIBIT P-4

5 Minute Newscast, 11 P.M., 10/4/63

Miami, Oct. 4 (UPI)—Hurricane Flora, with a toll of at least 41 persons dead in its wake, crashed through Eastern Cuba's mountains into the Atlantic tonight and headed toward the Bahamas building up shrieking 115 mile-an-hour winds.

The course of the storm varied in weather bureau reports between Northwest and North-Northwest, but forecasters put the chances of Flora's lethal center striking South Florida at "less than 50 per cent."

The Weather Bureau, however, said rough seas and surf rolling in advance of Flora would spread through the Bahamas tonight "and probably reach the Southeast Florida coast tomorrow."

South Florida coastal residents were urged to keep in close touch with advisories, and Bahamians in the West and Central Islands were warned to batten down.

Approximately 300 persons showed up tonight at the 11th and Wharton Police Station calling for additional police to protect students at the Bok School in South Philadelphia, the scene of recent juvenile fights. Police Inspector Fox spoke to the parents who were accompanied by a small band consisting of two bugles, drum and cymbals. The entire delegation was lead by a flag bearer. . . . City Council President Paul Dortona also came to the 11th and Wharton Station and spoke to the parents. Police Inspector Fox told the parents that an additional 100 policemen both uniformed and plain clothes men have been assigned to the area not only during school hours but also carrying over into the evening hours. The parents left the station house about 9:25 apparently satisfied with the efforts of the police to keep unruly teen-agers in line. . . .

Miraculously no one was seriously injured in a chain reaction accident on the Schuylkill Expressway on the University Avenue Bridge Northbound at about 7:45 tonight. The accident started with a two-car collision at the University Avenue Exit and then car after car piled into them. According to the Accident Investigation Division only two persons were taken to PGH for X-rays and released. . . . Police were finally able to get all of the cars cleared away at about 9:30 tonight. . . .

The Philadelphia Fire Department is fighting (has brought under control) a one alarm fire at 31st and Reed Streets in the Majestic Wood Supply Company. . . . According to eye witnesses flames could be seen leaping from the building when firemen arrived on the scene shortly before 10:30 tonight. . . .

The Hotel Strike here in Philadelphia continues tonight. Tomorrow Federal Mediator Rex Marlow will talk with both sides separately and then will call them together for joint talks on Sunday. . . . So far negotiations between the Motel, Hotel and Club Workers Union and the Hotel Managers has produced no area of agreement. . . .

16-year-old Russell Ott was convicted of murder in the first degree for beating to death 76-year-old Louis Goldstein in his Kensington Avenue shoe store in August 1962. The jury could not agree on the penalty so Judge Sloan dismissed the panel and withheld sentencing the youth to life in prison pending an appeal of the verdict by his attorney.

Captain Clarence Ferguson's Special Investigations Squad this afternoon raided the home of 42-year-old George Rosenbloom in the 1800 Block of Nestor Street and confiscated 1,000 allegedly obscene books. At the same time the Squad also raided a barn Nestor rented on Welsh Road in which they picked up another 3,000 allegedly obscene books. Rosenbloom is free on $1,000 bail from a previous raid on

Newsstands in the City last Tuesday. He will be given a hearing tomorrow on charges of possession of obscene material.

United Nations, N. Y., Oct. 4 (UPI)—Emperor Haile Selassie of Ethiopia, whose rejected appeal for help against aggression in 1936 signalled the end of the League of Nations, today saluted the United Nations as "the best—and perhaps the last—hope for the peaceful survival of mankind."

The Little King with the imposing title stood before the assembled envoys of the world for the first time in 27 years and exercised a historical privilege few would have denied him: the right to say "I told you so."

The United States is withdrawing and reassigning its military and economic aid personnel in Honduras and the Dominican Republic.

Recent Military Coups (KOOS) have overthrown both governments and Secretary of State Dean Rusk says the U.S. views the events with "utmost gravity."

EXHIBIT P-5

5 Minute Newscast, 1 A.M., 10/5/63

(Miami)—The Weather Bureau at Miami reported at midnight, EDT, that Hurricane "Flora" will deliver at least a glancing blow to Southern Florida.

The death-dealing storm—carrying winds to 115 miles an hour—was on a Northwesterly course after crashing through Eastern Cuba earlier Friday. At last report, Flora was just North of the Cuban Coast about 425 miles Southeast of Miami and moving Northwest at 10 miles an hour.

Forecasters say steering current are weak and it might tkae 24 hours to definitely determine Flora's course. Residents of Southeastern Florida were told warning will probably be hoisted Saturday but did not specify if they would be huricane or gale-force warnings.

A man arrested Friday by the Special Investigation Squad of Capt. Clarence Ferguson, is believed to be one of the main sources of obscene literature in Phila. A hearing will be held today for George Rosenbloom, of the 18 Hundred Block of Nester Street, before Magistrate Raymond Malone, on charges of possessing the literature. Rosenbloom was picked up Friday, with about a thousand of the reportedly obscene books on hand. Capt. Ferguson said that police may have hit one of the major sources of supply.

The Electric rates of residents of Suburban Bucks, Montgomery, Chester, and Delaware Counties, as well as the Delta Section of York County, will be reduced, under new rate changes, approved by the Public Utility Commission—good news for a large amount of subscribers. However, the residential rates in Phila. will remain unchanged. . . . But, the rates of Commercial and Industrial power uses will be increased. The reductions, incidently, will amount to over a million-and-a-half dollars annually.

More negotiations are scheduled today, in a continuing effort to reach a settlement in the Phila. Hotel Employees Strike. Talks with Federal Mediators Friday produced no results.

(Paris)—The possibility of West Germany joining France to build an European Atomic force was revealed Friday in Paris. Chancellor Adenauer said in a copyrighted interview with a French newspaper (Le Figaro) that French and West German Foreign Policy was similar and that such an alliance was possible. He denied Germany was approaching a more flexible attitude toward Russia.

(Caracas)—Pro-Castro terrorists have killed four persons in retaliation for a government crackdown on Communists in Venezuela. Three soldiers were killed in a gunfight that followed the ambushing of an army jeep by terrorists and a policeman was killed by a Communist grenade. A terrorist also died in the jeep ambushing.

(Montreal)—Talks aimed at settling a walkout of nearly four thousand longshoremen at three Canadian St. Lawrence River Ports have adjourned. Federal Mediator Rene Lippe, a 53-year-old Montreal Judge, says no new talks are planned but that proposals will be made to a meeting of the International Longshoremen's Association Sunday. The walkout came to back demands for settlement of an Inter-Union Wage Dispute. The three ports involved are loaded with grain for Russian ships.

(San Diego)—The Navy is holding an Aviation Machinist's Mate on suspicion of sabotaging nine helicopters at San Diego. The Navy said 21-year-old John Paul Cook cut wires to electronic gear on half the 18 craft on the flight line ready to fly to the Carrier Yorktown offshore, September 16th. The damage was found during preflight inspections and repaired within 42 hours.

(Chicago)—The man who ran Chicago's Public Schools for 10 years resigned Friday in a dispute with the School Board over alleged discrimination and administration. Benjamin Willis said the Board invaded his domain of administration in permitting gifted students to transfer to schools with more advanced programs. This went against the traditional neighborhood policy of schools and, according to Willis, inferred discrimination.

EXHIBIT P-6

90 Second Format, 1:30 A.M., 10/5/63

A hearing is set later this morning for George Rosenbloom of the 1800 Block of Nester Avenue. . . A raid on Rosenbloom's home yesterday by Captain Clarence Ferguson's Special Investigation Squad turned up some one thousand allegedly obscene books.

Sixteen-year-old Russel Ott has been convicted of first degree murder and sentenced to life in prison for the August Thirtieth murder of Louis Goldstein . . . a 75-year-old North Phila. shoe merchant.

Some three hundred South Phila. residents last night marched in protest on the 11th and Wharton Sts. police station . . . urging police to protect students at the Bok Vocational School in that section of the City.

Hurricane Flora was last reported (at 11 P.M. EDT) about 425 miles Southeast of Miami on a course that could deal at least a sideswiping blow to Southern Florida.

Authorities in Louisiana have arrested three leaders of the Southern Conference Education Fund and labeled the integration group a Communist front.

Pro-Castro terrorists in Caracas (KUH-RAH'-KUHS), Venezuela, killed at least five persons Friday night in a series of raids which followed a government crackdown on Communists.

The State Department says the Communist countries of Czechoslovakia, Hungary and Bulgaria have approached the United States about buying wheat.

(London)—Britain has demanded for the second time the release of 19 Cuban refugees captured recently by Castro forces from a British Island in the Caribbean. The note also wanted a promise there will be no similar incidents in the future.

EXHIBIT P-7

5 Minute Newscast, 6 A.M., 10/5/63

A fire tragedy in Phila. this morning: shortly after 4 A.M. flames enveloped a two-story row home at 4745 Meridian St. taking the lives of a mother and her daughter . . . minor injuries were sustained by a father and son. The medical examiner's office identified the fatalities as 51-year-old Mary Carr and her 26-year-old daughter Ellen pronounced dead at Frankford Hospital. Neighbors were awakened by the screams of a man on the roof of the burning structure, presumably the father. An alarm was quickly sounded, and firemen brought the blaze under control about 45 minutes later.

In Fairless Hills in Bucks County, meanwhile, what is described as a multi-million dollar fire has virtually destroyed the sprawling Atlantic Thrift Center on U.S. Route One. Firemen from practically every fire company in the lower part of Bucks County were called into action after the first alarm was sounded shortly after two A.M. It's estimated about 5 hundred firemen fought the flames for several hours before the general alarmer was finally declared under control. Sparks showered the area and endangered firefighters and nearby homes. One fireman suffered a broken arm and is being treated in Mercer Hospital in Trenton, across the Delaware from the blazing inferno. That appears to be the extent of casualties thus far. WIP News was told the fire broke out in the supply room, cause still to be determined.

A hearing is set for later this morning for George Rosenbloom of the 1800 Block of Nester Avenue. . . . A raid on Rosenbloom's home yesterday by Captain Clarence Ferguson's Special Investigation Squad turned up some one thousand allegedly obscene books.

Sixteen-year-old Russell Ott has been convicted of first degree murder and sentenced to life in prison for the August Thirtieth murder of Louis Goldstein . . . a 75-year-old North Phila. shoe merchant.

Some three hundred South Phila. residents last night marched in protest on the 11th and Wharton Sts. Police Station . . . urging police to protect students at the Bok Vocational School in that section of the city.

(Saigon)—Red terrorists bomber a bar-restaurant last night about 60 miles North of Saigon. Ten American servicemen and 10 Vietnamese men and women were wounded.

(Saigon)—Another Buddhist Priest burned himself to death in Saigon today . . . presumably to protest persecution of his faith by the Vietnamese government. Reporters were summoned to the scene by anonymous phone calls shortly before the priest set his robes on fire.

(Miami)—Hurricane or gale warnings may be posted later today for Florida's Southwest coast as Hurricane "Flora" churns through the Atlantic. The storm was last reported (3 A.M., EDT) off the Northeastern Coast of Cuba, moving about 10 miles an hour on a Northwest to West-Northwest course.

The Weather Bureau warns the storm is expected to intensify now that it has passed over the mountainous terrain of Cuba. The hurricane is now aiming its fury at the Bahamas where near hurricane force winds have already been reported on one island.

(Paris)—Chancellor Adenauer says there is a possibility West Germany may join France in building a nuclear force for Europe. Adenauer made his statement in a copyrighted interview with a Paris newspaper (Le Figaro), saying West German and French Foreign Policy are moving along the same lines.

(Miami)—The Coast Guard plans to renew its search for two missing American adventurers today if weather permits. Freelance photographer Alexander Rorke and Geoffrey have been missing since Sunday on a flight to Central America. Both have been involved in anti-Castro activities.

EXHIBIT P-8

5 Minute Newscast, 8 A.M., 10/5/63

A fire tragedy in Phila. this morning: shortly after 4 A.M. flames enveloped a two-story row home at 4745 Meridian St. taking the lives of a mother and her daughter . . . minor injuries were sustained by the father and son. The medical examiner's office identified the fatalities as 51-year-old Mary Carr and her 26-year-old daughter Ellen pronounced dead at Frankford Hospital.

In Fairless Hills in Bucks County, meanwhile, what is described as a multi-million dollar fire has virtually destroyed the sprawling Atlantic Thrift Center on U.S. Route One. Firemen from practically every fire company in the lower part of Bucks County were called into action after the first alarm was sounded shortly after two A.M. About 5 hundred firemen fought the flames for several hours. One fireman suffered a broken arm and is being treated in Mercer Hospital in Trenton, across the Delaware from the blazing inferno.

Ten American servicemen were wounded when a bomb exploded in a bar-restaurant south of Saigon, South Viet Nam.

Mrs. Jacqueline Kennedy, cruising aboard a luxury yacht, is reported heading for Istanbul.

The Yankees will pitch Jim Bouton against the Dodgers' Don Drysdale in the third game of the World Series at Los Angeles today.

Former Vice President Nixon has attacked the Administration's dealing with Russia.

President Goulart (Goo-labr') of Brazil has asked the federal congress to put the nation under modified martial law for 30 days. Goulart hopes to settle national unrest triggered by inflation.

The Algerian government fears the country will be torn by civil war if rebellious Berber tribesmen continue to reject peace talks offers.

The President's mother will receive an honorary degree from Saint Joseph College in Emmitsburg, Maryland, today. Mrs. Rose Kennedy also will be cited as "an outstanding mother."

A federal mediator announced last night in Montreal that talks aimed at settling the longshoremen's strike in St. Lawrence River ports are in adjournment. The strike has tied up western grain being loaded at Canadian ports for Russia.

The State Department says Soviet astronauts Yuri Gagarin (Ga-gahr-ihn) and Valentina Tereshkova (Tehr-esh-koh'-vah) are expected to spend two days in New York City in the near future.

Republican Congressman Robert Taft Junior of Ohio said last night in Lansing he would not run for the Vice Presidency in 1964 . . . even if nominated.

Secretary of State Dean Rusk is expected to appear before the Senate Internal Security Subcommittee soon to answer questions about departmental policies.

Pro-Castro commandos launched a counter-offensive in Caracas (Kuh-rah'-kuhs), Venezuela, last night, killing five persons. The terrorist shootings were believed to be in retaliation for a government crackdown on communists.

A mothers' march on a South Phila. police station has demanded more police protection in the increasing racial violence, and ministers and priests are being urged to call for calm and restraint during church services tomorrow.

Next joint negotiating sessions are scheduled for tomorrow afternoon in the continuing hotel workers strike.

EXHIBIT P-9

10 Minute News Format, 6:30 A.M., 10/21/63

It's no comment this morning when newsmen inquire as to the whereabouts of reputed Cosa Nostra boss Angelo Bruno. It's difficult to decide whether law enforcement agencies don't know where he is . . . or whether they know but would rather not say until he's in custody.

Over the weekend . . . in the wake of several arrests of top gangland figures and alleged loan-shark kingpins on charges of violating Federal extortion laws . . . a warrant was issued for Bruno's arrest on similar charges. U.S. Commissioner Edward Furia held all the others in high bail . . . and says he'll set bail for Bruno at no less than 100-thousand dollars. Furia says a bail bondsman has inquired . . . indicating that Bruno may be thinking of giving himself up.

Federal District Judge Joseph S. Lord, Third, will hear arguments today from two publishers and a distributor . . . all seeking an injunction against Philadelphia Police Commissioner Howard Leary . . . District Attorney James C. Crumlish, Jr. . . . a local television station and a newspaper . . . ordering them to lay off the smut literature racket.

The girlie-book peddlers say the police crackdown and continued reference to their borderline literature as smut or filth is hurting their business. Judge Lord refused to issue a temporary injunction when he was first approached. Today he'll decide the issue. It will set a precedent . . . and if the injunction is not granted . . . it could signal an even more intense effort to rid the city of pornography.

For the first time in a long time . . . Jimmy Hoffa did not have his way . . . or at least . . . didn't get everything he asked from the local Teamster membership in Philadelphia yesterday.

After reading the long-awaited letter of resignation from Ray Cohen as secretary-treasurer of Local 107 . . . Hoffa launched a campaign to secure the Local's power of attorney with which he'd like to bargain for a national uniform freight rate agreement.

After 2½ hours of argument at Convention Hall . . . Hoffa had to settle for an agreement that freight drivers in the Local would vote on whether or not to give him the power of attorney. Another meeting next Sunday will decide whether or not the vote should be taken with voting machines.

(Beckenham, England)—Parents in Beckenham, England, where wondering whether their children had grown taller almost overnight. Then it was discovered that a height recorder at a county school had been set one inch too high.

The Weather Bureau's "no rain" forecast eliminates hope that the serious drought situation here in Penna., New Jersey and elsewhere may soon be alleviated. For a time it appeared that the middle-Atlantic states storm might move up the coast close enough to dump a couple inches of badly-needed rain . . . but as of the moment newly-formed Hurricane Ginny, is forecast as destined to move out to the open Atlantic. New Jersey Gov. Hughes over the weekend put into effect a ban on all open fires, joining Penna. in stringent regulation in hopes that forest fire conditions, bad enough now, don't worsen. Still out of control on the Jersey side is the Norvin Green State forest fire which has already consumed 3 thousand acres near Bloomingdale. About 2 hundred fires of varying proportions have broken out in Penna. over the past week, the worst in Cambria and Bedford counties.

(Cape Hatteras, North Carolina)—Hurricane "Ginny" has paused some 90 miles south-southeast of Cape Hatteras,

North Carolina, near where hurricane warnings were posted last night. Weathermen say the storm—packing winds up to 90 miles per hour at its core—is expected to move northeastward rather slowly toward open seas today, increasing in intensity at a moderate rate during the next 24 hours.

The Coast Guard has ordered its men to low lying areas in Tidewater, Virginia and coastal North Carolina in the face of possible flooding. Some minor flooding with tides above normal is expected farther northward later, depending on the future movement of the storm.

(Portsmouth, Virginia)—A decommissioned destroyer escort and its tow vessel are riding out heavy seas caused by Hurricane Ginny some 45 miles southeast of Cape Lookout, North Carolina. The Coast Guard said the vessels—encountering 40 to 50 foot seas—became separated Saturday when a tow line broke.

A two alarm fire last night was contained before flames reached a supply of highly inflammable cleaning fluid in a West Phila. dry-cleaning plant, at 62nd and Hazel Ave. Cause of the blaze is still to be determined. The second alarm was sounded as a precautionary measure, since a number of row dwellings were located immediately adjacent to the fire location.

A three-judge panel convenes in Courtroom 453 in City Hall at ten o'clock this morning to hear evidence and determine the degree of guilt and sentence for 34-year-old Anthony Scoleri. Scoleri, facing trial for the second time in the hold-up slaying of a Phila. dry-goods store operator in 1958, pleaded guilty last week just before the jury-selection was to have been completed. The DA's office is seeking the death penalty. Five years ago Scoleri was sentenced to death but won a new trial when the Court of Appeals ruled the trial was prejudiced by the introduction of previous armed robberies as evidence.

(Leopoldville, the Congo)—The Central Government has declared a state of emergency and imposed martial law in the Leopoldville area of the Congo. Last night's action followed a government announcement that it had uncovered proof of a subversive plot against it.

(London)—Sharp Labor opposition is expected to a reported move by British Prime Minister Lord Home (Hewm) that resumption of Parliament be delayed. Home is reported planning to ask Queen Elizabeth to delay Parliament's return until he can win a seat in the House of Commons in a Scottish by-election next month.

(London)—The eldest daughter of former Prime Minister Winston Churchill was found dead yesterday at the age of 54. Diane Churchill was the former wife of Commonwealth Relations Secretary Duncan Sandys (Sands). The cause of death was not disclosed.

(Algiers)—No new fighting is reported along the Algerian-Moroccan border this morning . . . although three battalions of fresh Algerian troops were flown in yesterday. Radio Algiers says Ethiopian Emperor Haile Selassie (High'-lee sehl-ah'-see) is expected in the city within 48 hours to try to mediate the dispute.

EXHIBIT P-10

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5 Minute Newscast, 7 A.M., 10/21/63

WIP Special Science Editor Stuart Loory dwells on the Nobel Award for Medicine given to Dr. John Eckles this past week. We'll hear that right after the news:

Hurricane Ginny, now off North Carolina, may grow in strength and move northeastward into open sea . . . little if any rain expected here to alleviate drought and attendant forest fire threats.

Two ships and two planes are searching for a decommissioned Navy destroyer-escort drifting helplessly in the hurricane area with ten men aboard.

The U.S. Supreme Court hears arguments today on whether a criminal contempt case against Mississippi Governor Burnett must be tried by a jury.

In the WIP area, a three judge panel is to decide the degree of guilt and sentence for 34-year-old Anthony Scoleri, who pleaded guilty last week to the holdup slaying of a Phila. grocer in 1958. Scoleri won a re-trial after an earlier conviction and death sentence.

Teamsters boss Jimmy Hoffa has announced the resignation of Secty. Treasurer Ray Cohen in Local 107.

Reports that alleged Costra Nostra figure Angelo Bruno may surrender himself to a U.S. arrest warrant follows inquiry by a bonding firm on the amount of bail to be set.

NAACP pickets may have more demonstrations today alleging schoolboard discrimination. Focal point of contention . . . the transfer of pupils from one All-Negro school to a predominately-Negro school some distance away.

Firemen expect to resume City Hall demonstrations today in demands for higher pay rates.

Two publishers and a distributor argue in court today economic and financial hardship in police crackdown on alleged smut literature.

The driving public gets a look at the Gustine Lake interchange construction work, with the relocated section of the East River Drive West of the Lake and the Queen Lane pumping station open at this hour.

Now Science Editor Stuart Loory

EXHIBIT P-11

10 Minute News Format, 8:30 A.M., 10/21/63

WIP News has indications this morning that Angelo Bruno will submit to arrest on the warrant which charges him with complicity in an interstate shylocking operation. For the uninitiated . . . shylocking is usury . . . with muscle mixed in. According to Federal authorities . . . Bruno . . . his henchmen . . . and a Lodi, N. J. man with lots of money . . . lent money to a suburban Philadelphia real estate speculator . . . then used beatings . . . threats . . and other forms of intimidation to get back nearly twice the original loan at extremely exorbitant interest rates.

Several men have been arrested . . . but not Bruno. All have been held in high bail . . . and U.S. Commissioner Edward Furia says when Bruno is in custody . . . it will take 100-thousand dollars to spring him. Furia says he has had an inquiry about this from a bail bondsman . . . but couldn't say whether the bondsman had, in turn, been talking with Bruno.

There are rumors that Bruno has fled Philadelphia . . . perhaps to another country . . . but these are only rumors as yet.

While Philadelphia buzzes about this big story . . . New Jersey authorities want to get some more evidence on the Cosa Nostra.

Garden State Attorney General Arthur Sills will lead the delegation . . . which includes his assistant . . . John Bergin . . . who testified in corroboration of some of Valachi's testimony before the Senate Rackets Committee.

The New Jersey authorities are pressing Valachi for details on several . . . as yet unsolved . . . murders and disappearances in the State.

In case you've never had occasion to use a voting machine before . . . instruction in the operation of the two types used in Philadelphia will get underway in City Hall courtyard this morning at 9. Instruction in the use of the Jamestown and Shoup machines will be held each weekday from 9 to 5:30 until November 4th . . . the day before elections.

Incidentally . . . WIP News plans for complete . . . and intelligently analytical coverage of the November 5th municipal elections are nearly complete. Our reporting team will include experts from both major political parties and a non-partisan observer to analyze the returns as they come in . . . ward by ward . . . and read trends and significant shifts of voter strength.

The City Registration Commission meets this morning to hear petitions from the Committee of 70 that several more names be stricken from the eligible voter rolls in Philadelphia.

Among those contesting the Committee's action are well-known drug distributor Sol Turnov . . . and city court employee George Twardy. It is the Committee of 70's contention that Turnov does not live at 6th and Callowhill as listed . . . but in suburban Wyncote . . . and that Twardy's center city address is not as stated.

Federal District Judge Joseph S. Lord, Third, will hear arguments today from two publishers and a distributor . . . all seeking an injunction against Philadelphia Police Commissioner Howard Leary . . . District Attorney James C. Crumlish, Jr. . . . a local television station and a newspaper . . . ordering them to lay off the smut literature racket.

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After reading the long-awaited letter of resignation from Ray Cohen as Secretary Treasurer of Local 107 . . . Hoffa launched a campaign to secure the Local's power of attorney with which he'd like to bargain for a national uniform freight rate agreement.

After 2½ hours of argument at Convention Hall . . . Hoffa had to settle for an agreement that freight drivers in the Local would vote on whether or not to give him the power of attorney. Another meeting next Sunday will decide whether or not the vote should be taken with voting machines.

The Weather Bureau's no rain forecast eliminates hope that the serious drought situation here in Penna., New Jersey and elsewhere may soon be alleviated. For a time it appeared that the middle-Atlantic states storm might move up the coast close enough to dump a couple inches of badly-needed rain . . . but as of the moment newly-formed Hurricane Ginny, is forecast as destined to move out to the open Atlantic. New Jersey Gov. Hughes over the weekend put into effect a ban on all open fires, joining Penna. in stringent regulation in hopes that forest fire conditions, bad enough now, don't worsen. Still out of control on the Jersey side is the Norvin Green State forest fire which has already consumed 3 thousand acres near Bloomingdale. About 2 hundred fires of varying proportions have broken out in Penna. over the past week, the worst in Cambria and Bedford counties.

A three-judge panel convenes in Courtroom 453 in City Hall at ten o'clock this morning to hear evidence and determine the degree of guilt and sentence for 34-year-old Anthony Scoleri. Scoleri, facing trial for the second time in the hold-up slaying of a Phila. dry-goods store operator in 1958, pleaded guilty last week just before the jury-selection was to have been completed. The DA's office is seeking the death penalty. Five years ago Scoleri was sentenced to death but won a new trial when the Court of Appeals ruled the trial was prejudiced by the introduction of previous armed robberies as evidence.

The City Health Department starts week-long efforts this morning to X-ray the entire Skid Row population for possible TB. Studies have shown that tuberculosis, is ten times more common in the area West of Franklin Square than any other area of the city.

President Kennedy will fly back to Washington this morning unless the fog now rolling in over Cape Cod grows worse. The President flew to Hyannis Port yesterday from Boston to visit his ailing father.

(Washington)—The Supreme Court will hear arguments today as to whether the criminal contempt case against Mississippi Governor Ross Barnett must be tried by a jury.

(United Nations)—Red China is expected to be turned down again today in its 14-year-old effort to gain membership in the United Nations.

EXHIBIT P-12

90 Second Format, 9:30 A.M., 10/21/63

The Philadelphia FBI Office anticipates the surrender of local Cosa Nostra Capo Angelo Bruno on charges of interstate extortion. . . .

Smut distributors today seek an injunction against police raids in Philadelphia. . . .

Philadelphia and Teamster boss Ray Cohen has resigned. . . .

Hurricane "Ginny" . . . centered 100 miles southeast of Cape Hatteras at latest report (6 A.M. EDT) . . . sent gale force winds across North Carolina's outer shores today.

A search is under way in the Atlantic for a decommissioned Navy vessel drifting helplessly in the hurricane area with 10 men aboard.

A native African Roman Catholic Bishop told the Ecumenical Council this morning to beware of colonialism masquerading under the appearance of religion.

Former British Prime Minister MacMillan says he will remain a member of Parliament for now, and will decide about future plans next year.

EXHIBIT P-13

90 Second Format, 10:30 A.M., 10/21/63

Hearings are slated at this hour on a plea from two publishers and a magazine distributor for an injunction against Philadelphia police, the District Attorney's Office . . . and communications media. The complainants charge they're being hurt economically by the current crackdown on smut.

Reputed Philadelphia crimeworld head . . . Angelo Bruno is expected to surrender himself on extortion charges. It's expected he will be released on bail of 100-thousand dollars.

The Weather Bureau holds little immediate hope for an end to the drought. . . . Hurricane Ginny remains about a 100 miles southeast of Cape Hatteras . . . Early yesterday she was expected to move up along the coast but she stalled out during the morning and is now moving only very slowly.

A decommissioned Navy ship with 10 men aboard is reported drifting helplessly in the vicinity of the hurricane.

Ethiopian Emperor Haile Selassi (High'-lee shel-ah'-see) is reported flying to Algiers today . . . apparently to act as mediator in the Algerian-Moroccan border dispute.

EXHIBIT P-14

90 Second Format, 11:30 A.M., 10/21/63

The Supreme Court has ordered reconsideration of the narcotics conviction that sent Vito Genovese to prison. Genovese was recently named as the "boss of all bosses" in the crime syndicate called Cosa Nostra.

The High Court has reversed the convictions of 373 Negro students charged with breach of the peace in a 1960 demonstration against segregation in Orangeburg, South Carolina.

There is a growing indication that reputed crimeworld head Angelo Bruno may be out of the country . . . and not about ready to surrender himself on an extortion charge. It's expected that if he does surrender himself . . . he'll be released on at least 100-thousand dollars bond.

Judge John Lord, Jr., has requested legal briefs to be filed Friday by defendants in the plea for an injunction against local police . . . the D.A.'s Office and communications media lodged by publishers and distributors of alleged smut literature. All defendants moved for dismissal.

The New Jersey Supreme Court has reversed the manslaughter conviction of Dr. Albert Weiner . . . charged in the deaths of 12 patients. The High Court held that criminal negligence had not been established.

Naval sources in New York say a missing destroyer escort has been sighted off Cape Fear, North Carolina . . . and a Coast Guard tug is on the way to help. The USS Fogg was being towed to a mothball fleet near Portsmouth, Virginia when she broke her mooring line in heavy seas whipped up by Hurricane Ginny.

EXHIBIT P-15

5 Minute Newscast, Noon, 10/21/63

The United States Supreme Court this morning ordered the reconsideration of convictions of crime lord Vito Genovese and nine co-defendants. The Second Court of Appeals in New York was ordered by the High Court to again look at the cases . . . with a view to a recent Supreme Court decision, and the recanting of testimony of a key Government witness.

Genovese and his co-defendants in appealing for a new trial say that the Government failed to make available . . . certain interview notes by a Justice Department prosecutor.

WIP News spoke to one of the areas key prosecutors within the hour . . . was told that the Supreme Court order does not mean that the 10 imprisoned men will immediately be freed on bail. He thinks that a six judge panel will sit and . . . if the Government concedes that key material was withheld from the defense . . . then the men could go free on bond while awaiting a new trial.

On the subject of criminals. The three men arrested Saturday night . . . said to be top agents of alleged Philadelphia rackets king-pin Angelo Bruno . . . are free on bond at this hour. Bruno, being sought on the same charge, that of interstate extortion, has not shown his face . . . continues to evade the Federal Government. As reported yesterday by WIP News . . . Bruno might have fled the country. Late this morning, WIP News was led to believe that this rumor may now be fact. That he could be in Puerto Rico.

WIP News was also led to believe that the victims of the extortion are being closely watched by Federal men . . . lest they lose a key witness in the up-coming trials.

Doctor Albert Weiner, the Erlton, New Jersey osteopath, convicted of manslaughter two years ago in the hepa-

titis deaths of twelve of his patients, is to get another trial. The State Supreme Court, by a five-to-two ruling, announced this morning that criminal negligence has *not* been proved, and further ruled seven-to-nothing that Weiner's medical license should not be revoked.

The Phila. Home and School Council President, Mrs. Joseph Ewing, this morning censured the NAACP pickets who appeared in front of the homes of School Superintendent Dr. Allen Wetter and Assistant Superintendent Charles Poindexter. Mrs. Ewing was particularly incensed about the signs carried at the Poindexter home, which referred to him as a "part-time Negro." The demonstrations alleged continued school-board discrimination, and pickets were out again this morning outside the School Board offices at 21st and the Parkway.

Arguments before District Judge Joseph Lord, Third in a publishers-distributor plea of financial and economic hardship in the city's crackdown on alleged smut literature have been postponed until Friday at the request of Defense attorneys. A TV station, the Evening Bulletin and the DA's office are the target of one publisher and one distributing firm.

Eagle Quarterback Sonny Jurgenson will be lost to the team for about two weeks. Following extensive examination of the injury Sonny suffered in yesterday's game with Cleveland was only a bad bruise from which he should recover. The team had earlier announced Sonny would be lost for four weeks . . . but further examination revealed the injury was not as bad as at first thought.

EXHIBIT P-16

5 Minute Newscast, 2 P.M., 10/21/63

The UN General Assembly today rejected Albania's bid to seat Red China in place of the Chinese Nationalists by a vote of 57-41 with 12 abstentions.

(Miami)—It has been learned that three boats carrying a heavily armed 21-man Cuban exile raiding party and an American woman identified as a free-lance photographer were intercepted off Miami Beach last night as they set course for Cuba. U-S Customs and Coast Guard officials intercepted the raiding party. The woman was identified as Dickey Chapelle, a well-known magazine photographer. U-S Customs officials in Miami say the 21 Cubans are members of the Commandos-L Exile Group that has staged several raids on Cuba. Customs Supervisor Joseph Fortier says "A considerable quantity" of machine guns, home-made bombs and ammunition was seized.

The Supreme Court this morning ordered an Appeals Court to reexamine its refusal to allow a new trial to Vito Genovese, recently identified as "boss of all bosses" of the Cosa Nostra crime cartel.

Genovese and nine co-defendants had appealed their 1959 convictions on narcotics charges but had been turned down by the Appeals Court. In its action today, the High Court directed the 2nd U.S. Circuit Court of Appeals to take another look at the case in light of a Supreme Court decision last term.

(Paterson)—An explosion has torn apart a block-long dye factory in Paterson. At least 16 or 17 persons have been injured. Police say the blast showered bricks on half a dozen firemen fighting a general alarm fire in the Franklin Finishing Company plant and may have trapped women workers in the twisted debris.

A Navy search plane has spotted a decommissioned Navy escort adrift in the vicinity of Hurricane "Ginny" off North Carolina. The ship is carrying 10 men.

The forecasters say Hurricane Ginny, with its 80-mile-an-hour winds, does not pose a serious threat to the mainland on its current course.

The High Bench has reversed the conviction of 373 Negro students for an anti-segregation demonstration in Orangeburg, South Carolina.

The New Jersey State Supreme Court has overturned the manslaughter conviction of Dr. Albert Weiner . . . convicted two years ago in the hepatitis deaths of 12 of his patients. By a five to two vote the High Court held that the charges of criminal negligence had not been proved . . . and by a seven to nothing vote held that Weiner's license should not be revoked. Faulty sterilization of equipment was cited as the primary reason for the deaths.

Further arguments are slated before Federal Judge John Lord, Jr. on Friday in the petition of two publishers and a distributor who are asking an injunction against further raids by police and the D.A.'s Office on smut publications. The complainants charge they are being hurt financially. . . . Judge Lord gave the defendants until Friday to file legal briefs in their request that the charges be dismissed.

One can well imagine what would happen if one were employed in top secret research work for this country . . . and were found to have lunched with a known communist. If you just lost your job . . . you'd be one of the luckier ones. But today . . . one of this country's top top-secret employees met for lunch with one of the world's best-known communists . . . and therein lies the world of difference between espionage and diplomacy.

Yugoslav President Tito was the top communist involved . . . the top-secret U.S. employee . . . George Kennan

. . . former Ambassador to Tito's country . . . and now a professor at the Princeton University Institute for Advanced Study. They lunched together at Princeton today in the company of President Robert Goheen.

One bar to coverage of the event which irked newsmen was the exclusion of these newsmen from the party which toured the inside of Princeton's Forrestal Research Center where scientists are carrying out research on hot gases. Though newsmen weren't allowed . . . Tito took the Cook's tour.

EXHIBIT P-17

90 Second Format, Noon, 10/21/63

In Federal Court later today . . . two publishers and a distributor of alleged smut literature will go before Judge Gold, claiming they are suffering economic and financial hardship because of a recent crackdown on such material.

Waterfront employers and the Human Relations Commission are slated to meet today to settle charges of discrimination made by Negro workers.

The F.B.I. continues to hunt for Angelo Bruno, acknowledged to be head of the Philadelphia branch of the Cosa Nostra. He is being sought in connection with a widespread extortion racket.

Hurricane "Ginny"—a fledgling storm with 90-mile-an-hour winds—is churning Atlantic waters 90 miles from Cape Hatteras, North Carolina.

A decommissioned destroyer-escort vessel with ten men aboard broke away from a tow vessel in the general storm area and is battling 50-foot waves.

British Prime Minister Lord Home (Hewm) has completed the formation of his Cabinet and reportedly will ask Queen Elizabeth to delay the resumption of Parliament until he can win a seat in the House of Commons.

President Kennedy heads back to the White House today following a visit with his ailing father at Cape Cod.

EXHIBIT P-18

10 Minute News Format, 5:30 P.M., 10/21/63

U.S. Steel Corp. has been subpoenaed by a Federal grand jury in New York, possibly in a government move to investigate the recent round of price increases in the steel industry.

A spokesman for U.S. Steel said the company had been served with a subpoena but he declined to comment on the contents. There was no immediate information as to what was asked.

Other major steel companies were understood to have also been subpoenaed.

Gale warnings remain aloft along the Jersey shore in anticipation of hurricane Ginny . . . still all but standing still off North Carolina. The storm which was expected to move up the coast yesterday is drifting slowly northeastward and is expected to remain very close to the same spot during the next 24 hours. Those who had been hoping for rain from the storm may still get it but later in the week, depending on what the storm does . . . her winds are estimated at 80 miles per hour in a small area near the center. . . . Gales extend about 260 miles to the north and east of the center.

Weary fire-fighters in New Jersey and elsewhere are fearful that the winds accompanying the storm will stir present forest and woods fires to new heights and dangers. One fire in Passaic County in New Jersey is still out of control after nine days.

Mayor Tate has submitted two proposed ordinances paving the way for a community college in the city. This came as the Senate approved . . . 60-19 a bill authorizing nearly two billion dollars in construction aid for colleges. The bill would allow the courts to decide whether any of the money goes to church-sponsored schools. The bill differs from the

House version in that it provides more money and places some strings on the funds. . . . it's expected to be some time before a conference committee works out a bill acceptable to both houses.

Members of the executive board of Teamster Local 107 meet this evening to appoint a replacement for Secretary-Treasurer Ray Cohen whose resignation was announced yesterday by Jimmy Hoffa. The man selected will serve out Cohen's unexpired term.

A meeting is slated for next Sunday among local teamsters and freight haulers to further discuss Hoffa's proposal for a national freight rate agreement. Hoffa asked yesterday for power of attorney to represent the local haulers . . . they refused to give it to him yet.

A three-judge panel is finishing up a pre-sentence investigation before making a recommendation in the Anthony Scolari case. The Commonwealth wound up its case against the accused murderer this afternoon . . . 23 witnesses were heard. Scolari after being found guilty and sentenced to death two years ago . . . asked for and received a new trial. . . . When the jury had been chosen . . . he changed his plea to guilty. Sentencing is expected tomorrow.

Pickets from the NAACP continued their presence outside the Board of Education offices this afternoon protesting what they term segregation procedures at the Meade school. WIP news has learned that the principal of the school has written parents of the students involved in proposed transfers offering several alternatives.

The former commander of the Philadelphia Naval Base . . . Rear Admiral James Kauffman is dead. Memorial services for the 76 year old admiral who passed away this morning will be held at the Holy Trinity Church on Rittenhouse Square on Wednesday.

Twenty-one persons were injured in the wake of a thunderous explosion at a Paterson New Jersey textile plant this

afternoon. The blast set off a general alarm fire in the building. . . . Most of the injuries were caused by flying bricks and debris.

The New Jersey State Supreme Court has overturned the manslaughter conviction of Erlton osteopath Dr. Albert Weiner. He was convicted of manslaughter following the deaths of 12 patients of hepitits. . . . The court held that criminal negligence was not proved.

Attorneys for a TV station . . . the Evening Bulletin . . . police commissioner Leary and the DA's office have been given until Friday to prepare legal briefs outlining their request for dismissal of a suit seeking to halt the recent series of raids on smut literature and pornographic material. The petition for an injunction against the raids was instituted by two publishers and a magazine distributor.

One can well imagine what would happen if one were employed in top secret research work for this country . . . and were found to have lunched with a top communist. If you lost your job . . . you'd be one of the luckier ones. But today . . . one of this country's top-secret employees met for lunch with one of the world's best known communists . . . and therein lies a world of difference between espionage and diplomacy.

Yugoslav President Tito was the top communist involved. . . . The top-secret U.S. employee . . . George Kennan . . . former ambassador to Tito's country . . . and now a professor at the Princeton University institute for advanced study. They lunched together at Princeton today in the company of president Robert Goheen.

One bar to coverage of the event which irked newsmen was the exclusion of these newsmen from the party which toured the inside of Princeton's Forrestal research center where scientists are carrying out research on hot gases. Though newsmen weren't allowed . . . Tito took the Cook's tour.

The Supreme Court has ordered an appeals court to take another look at the case of convicted criminal leader Vito Genovese and nine others.

Genovese—whom underworld figure Joseph Valachi (vuh-lah'-chee) called the "boss of all bosses"—is serving a 15-year term on the 1959 narcotics conviction. The men argued their convictions were invalid because a government witness later changed some of his trial testimony.

In 1960, the Supreme Court refused to review Genovese's conviction. The court's decision today stems from a precedent set last term.

Those groups involved in attempts to abolish capital punishment will note with interest one of the decisions handed down by the U.S. Supreme Court today. Actually . . . of greater interest will be the lone dissenting opinion in the decision. The high court denied hearings to two men sentenced to death in Virginia and Alabama for the crime of rape. In disagreeing with his senior colleagues . . . the junior associate justice . . . Arthur Goldberg declared that review should be granted on the basis that the Supreme Court should decide for all time whether the U.S. Constitution permits imposition of the death penalty . . . in Justice Goldberg's words . . . "on a convicted rapist who has neither taken nor endangered human life."

Emperor Haile Selassie (high'-lee sehl-as'-see) of Ethiopia is in Algiers for what may be his toughest task in 50 years as a diplomat.

Selassie hopes to help settle the border dispute between Algeria and Morocco—but observers point out that neither side is willing to give ground.

Steel Magazine says automakers will have to step up orders quickly if steel shipments are to continue to move up next month. . . . The construction industry . . . the mainstay in past months is beginning to falter due to the season.

The commerce department says September factory orders for hard goods rose four percent last month. . . . Orders are up ten percent over a year ago. . . . Sales are up five percent from the volume reported a year ago.

S. A. Skillman has been appointed general sales manager of the Lincoln-Mercury division of Ford. Skillman is a Philadelphia native . . . and is a former vice president of Studebaker.

(Wall Street)—Stocks hit new high ground today on fairly heavy trading. But late profit-taking tended to push some gainers below their best levels.

EXHIBIT P-19

5 Minute Newscast, 11 A.M., 10/25/63

Hurricane Ginny is heading steadily toward the South Carolina coast. Residents of low-lying areas have been ordered to evacuate by noon Phila. time before the full fury of the storm hit this afternoon.

At 9 A.M. EST (10 A.M. EDT) Ginny was located 73 miles south-southeast of Charleston and moving to the north at 8 miles an hour with winds of 95 mph at its center.

Weather officials said the storm probably would hit here this afternoon and then move up the coastline to North Carolina tonight.

Residents of resort islands and other low-lying areas around this historic seaport city boarded up their homes and headed for inland quarters.

Police and firemen moved up and down Folly Beach, Isle of Palms and Sullivans Island in loudspeaker trucks urging about 10,000 winter residents of the islands to move to higher ground.

Tides as much as nine feet above normal were predicted for areas along the South Carolina coast.

The Philadelphia District Attorney . . . Police Commissioner Howard Leary . . . a TV station and a newspaper must file papers with Federal court today explaining why they should not be enjoined from further raids on local newsstands in a hunt for pornographic literature.

Two publishers and a distributor claim the raids are hurting their business.

The New Jersey turnpike is now open for its entire length after being closed between exits 14 and 18 and between exits one and two for some time this morning. Thick fog was to blame on the northern end. . . . The fog and a chain reaction accident to blame on the southern leg.

David Reick . . . president of Transport Workers Local 234 . . . has quit. He claims personal reasons . . . but WIP news has learned on good authority that he lost out in a battle to get the union to support Mayor James Tate in the upcoming election. . . .

21 firemen are under suspension for picketing one of the Mayor's can[illegible]n speeches. Among those fired was fire-fighters unio[illegible]sident James Forbes . . . who says he'll fight it in the courts. Forbes is a registered Republican.

NAACP President Cecil Moore says he's going into Federal court this morning to file contempt charges against the Phila. Board of Education . . . this for alleged violation of an agreement negotiated before Federal Judge Harold K. Wood last month under which certain ground rules were established on the matter of teacher transfers. The Agreement on transfers does not actually go into effect until Nov. 1st, but Moore wants the Board held in contempt of court for what he calls wholesale transfers prior to the agreement date.

Peine, Germany, Oct. 25 (UPI)—A huge wall of watery sludge trapped 50 iron ore miners below ground today. Rescue workers drilled a six-inch shaft and made contact with seven of the imprisoned men, but there was no word of the other 43 miners who were feared dead.

The men became trapped by an earth slide last night at the Lengede-Broistedt mine, 10 miles south of Peine in West Germany's province of lower Saxony.

A full shift of 129 men went to work in the mine at 2 P.M. yesterday, and all were there at 8 P.M. (3 P.M. EDT) when tons of watery sludge, mud, and rocks cascaded into the 100-yard-deep pit.

More troop movements like operation "Big Lift" may be in the works.

Big Lift ended yesterday with more than 16-thousand troops flown from Texas to West Germany in just over 63 hours.

EXHIBIT P-20

10 Minute News Format, 4:30 P.M., 10/25/63

Erratic hurricane Ginny continues its advance on the Carolinas coast with 100-mile-an-hour fury. More than 10,000 coastal residents are scurrying for higher ground.

Forecasters said the center of the meandering tropical twister, which has kept the eastern seaboard on edge for days, likely would slam into the coast near Myrtle Beach after midnight.

A late weather bulletin placed the center of the storm about 70 miles southeast of Charleston.

This puts the storm five miles further to sea than it had been three hours previous and the Weather Bureau said the "position represents a northeasterly course" as opposed to the northerly course Ginny had been traveling.

Pointing out that Ginny has been noted for its "loops, stalls and erratic movement," the Weather Bureau said that the time interval between the two late fixes was "too short to represent a definite trend of storm movement."

Still fresh in the memory of many residents is hurricane Hazel—a 1954 monster that roared ashore at high tide just below Myrtle Beach picking up houses and depositing them a half mile away.

The last hurricane to smash ashore in the area was Gracie in 1959. It claimed seven lives.

From Cape Fear southward, the coast line is a beehive of activity.

The Red Cross opened 63 shelters, and resident—many of them women with children in their arms—quickly filled them.

Adding to the potential danger of Ginny, which the Weather Bureau termed a "small but dangerous hurricane," was the possibility the storm might spawn tornadoes.

At least eight persons were injured in what Crucible Steel Company terms an accident at the plant at mid-afternoon. Delaware County Hospital reports it is treating two men for severe foot injuries. . . . Fitzgerald-Mercy Hospital reports six men are being treated there. Officials of Crucible on Union Avenue in East Lansdowne have refused comment as yet. . . . Several fire companies were called to the scene.

The ranks of Philadelphia firemen were depleted by another 31 men this afternoon. Fire Commissioner Frank McNamee suspended them for alleged political activity . . . an allegation denied by the firemen who have retained former State Attorney General Frank Truscott to represent them. MacNamee's action brings to 52 . . . the number of firemen suspended with an eye towards dismissal for picketing at "Tate for Mayor" headquarters. The firemen contend they were peacefully picketing to drum up support for their efforts to obtain what they term a decent pay raise. McNamee . . . who on occasion has seen fit to disagree with the Mayor and the administration himself apparently feels this is carrying the effort too far.

The scene at Tate headquarters was further enlightened . . . for want of a better term during the noon hour as Republican women lent their vocal talents to a few songs . . . not deemed in support of the Democratic campaign.

Demonstrators from the Congress of Racial Equality picketed Republican headquarters in support of better housing in the city. Just to show their demonstrations aren't to be deemed in support or opposition of either party . . . the pickets say they'll appear at Mayor Tate's rallies too.

Still on the political scene . . .

City Democratic Chairman William Green spurned the mantle of "boss" this afternoon. Congressman Green, at a news conference, denied Republican charges that he wields boss-power over Philadelphia Democrats. "I'm only boss in my own home," he said, "and even there, I'm number-2

The Congressman then lit into Gov. William Scran-
nd Philadelphia's Republican Mayoralty candidate
McDermott. Green claims authoritive information
ting the Governor, during this past summer, met with
rmott to ask the local standard-bearer to withdraw
he Mayoralty race. The Congressman also maintains
rmott told a Republican policy group this summer that
cDermott, would oppose a number of local projects,
ing the building of a new U.S. mint in this city. Green
s McDermott has shown himself to be opposed to public
W.I.P. hopes to have, shortly, a reply from Mr. Mc-
ott regarding Congressman Green's allegations.
t was confirmed by the Democratic leader this afternoon
President Kennedy will arrive in Philadelphia on Octo-
0th to give the Tate-for-Mayor campaign a one-day
And Congressman Green concluded his news con-
e by saying he wants to look more closely at remarks
red by Gov. Scranton Tuesday night to a Convention
.O.P. rally . . . that Mr. Green may anticipate a suit
st the Governor, after the forthcoming elections, for
of Scranton's statements about Green.
saiah Crippens . . . attorney for the local branch of the
CP has filed a contempt suit in Federal court against
hiladelphia Board of Education. The suit filed within
lf hour . . . alleges that the board is acting in violation
agreement negotiated before Federal Judge Harold K.
under which certain ground rules were established for
er transfers. The agreement does not go into effect
the first of the month . . . but the association maintains
oard is in contempt for what it calls wholesale transfers
to the effective date of the agreement.
Phillip Testa . . . alleged second in command to reputed
Nostra boss Angelo Bruno is joined James Demarco
lias Samuel Roberts in jail on contempt charges. Testa
o testify before the Federal Grand Jury probing the

alleged interstate extortion racket involving Bruno and others . . . he apparently took the Fifth Amendment too many times and was remanded to jail for an indefinite term without bail . . . the same fate handed Demarco yesterday. Federal agents are believed pleased at the action since they can keep their eye on both men . . . and talk to them without the possibility of their running away.

Federal Judge Joseph Lord, Junior has taken under advisement a series of legal briefs requesting dismissal of a petition for an injunction against further smut raids by the D.A.'s office and the police department. The petition . . . filed by two publishers and a distributor of magazines says the raids have hurt business.

South district police kept up the attack on alleged numbers operators this afternoon arresting 61 year old Vincent Lanziano at his home . . . 1231 Wilder Street. Officers say they found 274 numbers plays under a doily on an upstairs bureau.

The U.S. Public Health Service has warned grocers to remove a liver paste from their shelves. The Paragon Brand and Epicure Brand is under suspicion for possible contamination.

(Peine./Pigh'-Neh/, Germany)—Seven miners have been rescued after being trapped for 23 hours 180 feet below ground in a flooded iron mine in West Germany. There is no word as yet on another 43 still trapped. It is feared they are dead.

President Tito of Yugoslavia left for home from New York City today but an anonymously telephoned bomb threat delayed his sailing for 40 minutes. No bomb was found.

Soviet Premier Khrushchev has called the U-S economic blockade against Cuba an attempt to take away what he called "the fruits of independenec."

EXHIBIT P-21

5 Minute Newscast, 12 Noon, 11/1/63

Forestry agents from Pennsylvania & New Jersey are on what one could call a "precipitation patrol" of brush & timberlands today to gauge the amount of rainfall in those tinderously dry regions. WIP-News talked a short time ago with Chief State Forester Ralph Wible in Harrisburg to ask him the general condition of Pennsylvania woodlands and to learn if there's a likelihood of lifting the ban on hunting & fishing in the Commonwealth:

(*Wible* . . . :45. ". . . hunting seasons.")

. . . Pennsylvania's Chief State Forester Ralph Wible.

In New Jersey, state naturalists are appraising the amount of rainfall all day today and may have some idea later this afternoon as to when sportsmen may again take to the woods. It has been learned that the Garden State enjoyed only five one-hundredth of an inch throughout the month of October.

The Pentagon has alerted U.S. Forces in the Pacific to start moving toward South Viet Nam to protect American lives if necessary. The forces involved are primarily from the U.S. Seventh Fleet. Pentagon spokesmen say the orders are "purely precautionary."

Official Washington is observing the situation closely and cautiously. . . . Presidential News Secretary Pierre Salinger says there will be no immediate comment from the White House. This . . . in the wake of a 45-minute meeting among top diplomatic and military officials with the President.

Word reaching Washington indicates the rebels attempting to overthrow the Diem regime are in control of much of Saigon with heavy fighting reported near the Presidential

Palace where troops loyal to Diem continue trying to protect the controversial leader.

South Viet Nam's U.N. delegate says it is difficult to conceive of a coup attempt in his country without the aid of the United States. Our State Department denies the charge.

Two small children were dead-on-arrival at Germantown Hospital late this morning after a fire ravaged their home at 6639 Musgrave Street in the City's Mt. Airy section. The fatalities are: 3year-old Anna Marie Stubbs and her 2-year-old brother Charles. Their mother Mrs. Dolores Stubbs suffered a wrist injury, and a visitor in the Stubbs home . . . 80-year-old Mrs. Rosie Keys . . . was treated for burns at the hospital. The cause of the blaze is not known as yet.

Assistant D.A. Vincent Velderale expressed his displeasure to WIP News this morning after Magistrate William Cibotti dismissed number-writing charges against Joshua "Jack" Marx. Police, who had arrested him, said Marx had in his possession records showing more than 17 thousand dollars in numbers bets. Velderale, who said rearrest action will be taken, indicated Magistrate Cibotti would not accept the testimony of the arresting officers.

The Schuylkill Expressway remains tied up beyond city line, hours after a tractor-trailer rammed through a bridge guard railing and hung over the side until pulled back by towing equipment. Two men in the cab of the disabled vehicle fell some 100 feet to a railroad siding below, one of them killed. He was Harold Weaver of Ephrata . . . a second man critically injured. Word just in says all lanes are now open on the affected expressway, and traffic should finally be getting back to normal.

U.S. District Judge John Lord told WIP News just before airtime that it may be another week before he will be able to render a decision as to whether he has jurisdiction in

the case of two publishers and a distributor who wish to restrain the D.A.'s office, the police chief, a TV station and the Bulletin for either making alleged raids of their publications, considered smut and immoral literature by the defendants named, or publicizing that they are in that category. Judge Lord then will be in a position to rule on injunction proceedings asked by the publishers and distributor claiming the loss of business in their operations.

EXHIBIT P-22

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

OUTDOOR AMERICAN CORPORATION
10 E. Liberty Street
Spokane, Washington
and
G. & L. DISTRIBUTORS
1852-B Noster Street
Philadelphia, Pennsylvania
and
GEORGE A. ROSENBLOOM
1852-B Noster Street
vs.
CITY OF PHILADELPHIA,
Pennsylvania
and
JAMES C. CRUMLISH, JR.
666 City Hall
Philadelphia, Pennsylvania
and
THE EVENING BULLETIN
30th and Market Streets
Philadelphia, Pennsylvania
and
TRIANGLE PUBLICATIONS, INC.
22nd and Arch Streets
Philadelphia, Pennsylvania
and
COLUMBIA BROADCASTING
SYSTEMS, INC.
City Line and Monument Avenues
Philadelphia, Pennsylvania

CIVIL
ACTION NO.

Complaint in Equity

1. The plaintiff, Outdoor American Corporation, is a corporation duly organized under the laws of the State of Washington, doing business in the City and County of Philadelphia, Pennsylvania, and engaged in the publication of Nudist Publications, which is shipped throughout the United States for distribution.

2. The plaintiff, G. & L. Distributors is a partnership registered under the Fictitious Names Act in the County of Philadelphia and Commonwealth of Pennsylvania and is engaged in the wholesale sale of magazines and paper back books in the City of Philadelphia, Pennsylvania, and elsewhere.

3. The plaintiff, George A. Rosenbloom is a resident of the City of Philadelphia, Pennsylvania, and one of the owners and one of the operators of the G. & L. Distributors.

4. The defendant, City of Philadelphia is a first class city in the County of Philadelphia, Pennsylvania, conducting a municipal government under a "Home Rule Charter."

5. The defendant, Howard R. Leary is the duly appointed Police Commissioner of the said City of Philadelphia.

6. The defendant, James C. Crumlish, Jr., is the duly elected District Attorney for the said City and County of Philadelphia and holds that statutory office.

7. The defendant, The Evening Bulletin is a corporation organized under the laws of Pennsylvania and engaged in the newspaper publishing business in the City and County of Philadelphia.

8. The defendant, Triangle Publications, Inc. is a Pennsylvania Corporation which owns and operates The Philadelphia Inquirer and Philadelphia Daily News and engaged in the newspaper publishing business in the City and County of Philadelphia.

9. The defendant, Columbia Broadcasting Systems, Inc. is a New York Corporation which owns and operates Station WCAU-TV in Philadelphia and engaged in the business of television broadcasting in the City and County of Philadelphia and elsewhere.

10. This action is brought pursuant to, and the jurisdiction of this Court is founded upon, the Federal Statute, 28 U. S. Code Sec. 1343(3) which provides, inter alias "district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . to redress the deprivation, under color of any state laws . . . of any right, privilege, or immunity secured by the Constitution of the United States. . . ."

11. The plaintiff, Outdoor American Corporation publishes in the State of Washington and elsewhere and causes to be distributed throughout the United States to certain wholesalers the following Nudist Publications:
Eden, Paradise, American Nudist, The Naturist, Sun Fun, Nude World, American Sunbather Magazine, Helles, Naturist Life, The Nudists and Nudist Primer.

12. The plaintiff, G. & L. Distributors, by one of its owners and operators, George A. Rosenbloom, orders and purchases magazines and paper back books printed and published in many states of the United States, almost entirely outside of the Commonwealth of Pennsylvania. Immediately upon receipt of said magazines and books, plaintiffs herein,

distribute the magazines and books, as a wholesaler, to retail outlets throughout the City and County of Philadelphia, Pennsylvania, and elsewhere. The customers of plaintiffs herein, are newsstands, drug stores, candy stores, and other vendors of magazines and books.

13. Beginning in the recent past, continuing in the present, and threatening to continue in the future, the defendants City of Philadelphia, Howard R. Leary, James C. Crumlish, Jr. and their subordinates have deliberately embarked upon a campaign to prevent the wholesale sale or retail sale or display of plaintiffs nudist books and magazines which they have determined are obscene and are acting under color of the Pennsylvania Statute making sale of obscene literature a felony. Act of 1939, June 24, P. L. 874, Sec. 524, as amended, 18 Purdon's Stats. Ann. Sec. 4524, and under such color is depriving plaintiffs of their constitutional rights, privileges and immunities.

14. Among the magazines for which plaintiff, G. & L. Distributors is the sole and exclusive local distributor and wholesaler are as enumerated in paragraph 11 of this Complaint. All of said magazines come to plaintiff from a point outside the Commonwealth of Pennsylvania, and constitute a part of the stream of interstate commerce.

15. The defendants, City of Philadelphia, Howard R. Leary, James C. Crumlish, Jr. have marshalled all resources of their respective offices for the purpose of preventing the sale, distribution, or display of any of the publications referred to in paragraph 11 of this Complaint.

16. Pursuant to the defendants' plan to prevent the sale, distribution and display at the foregoing books and magazines on or about October 1, 1963, without any search warrant

and under color of the statute as hereinbefore mentioned in paragraph 13 of this Complaint, the defendant, City of Philadelphia, through its agents, servants and employees, the defendant, Howard R. Leary, Police Commissioner and his subordinates, did arrest the plaintiff, George A. Rosenbloom and confiscate and seize the property of the plaintiff, G. & L. Distributors, 18 boxes of books and magazines which included Nudist, Natures Life, Hellas, Eden, Naturalist, Sun Fun, American Nudist Leader, and Paradise. Following this, the defendant, James C. Crumlish, Jr., District Attorney, through his subordinates, commenced criminal prosecution.

17. Pursuant to the defendants' plan, City of Philadelphia, Howard R. Leary, James C. Crumlish, Jr., to prevent the sale, distribution and display of the foregoing books and magazines, on or about October 4, 1963, police officers, acting pursuant to the direction and under the authority of the defendants, City of Philadelphia and Howard R. Leary, Police Commissioner, entered the premises of plaintiffs, George A. Rosenbloom and G. & L. Distributors, and pursuant to an illegal warrant for search and seizure, seized the following for purpose of illegal confiscation: 17 cartons containing 1700 Eden Magazines, 288 Naturalist Life, 8 Nude World, 13 Paradise, 1 Sunbather, 1 Naturist, 1 Eden, 1 Sunshine Health, 157 Hellas Vol. 2 #10, 287 Hellas Vol. 1 #5, 5 Hellas Vol. 2 #9. Following this, the plaintiff George A. Rosenbloom was arrested and the defendant, James C. Crumlish, Jr., District Attorney, through his subordinates commenced criminal prosecution.

18. The foregoing arrest and seizure was illegal and without authority of law.

19. The defendant, Triangle Publications, Inc., through its agents, servants and employees, on or about October 2,

1963 and October 3, 1963, did publish or cause to be published in their daily newspapers, The Philadelphia Inquirer and Philadelphia Daily News, certain stories, pictures and articles referring to the plaintiffs' magazines and books as smut and obscene, in a false and malicious manner, and characterized the plaintiffs as dealers in smut and obscenity.

20. The defendant, The Evening Bulletin, through its agents, servants and employees, on or about October 1, 1963, did publish or cause to be published in their daily newspaper, certain stories, pictures and articles referring to the plaintiffs' magazines and books as smut and obscene, in a false and malicious manner, and characterized the plaintiffs as dealers in smut and obscenity.

21. The defendant, Columbia Broadcasting Systems, Inc., through its agents, servants and employees, on or about October 1, 1963, on the 11 o'clock P. M. News Program of WCAU-TV, did broadcast and publish a television program referring to the plaintiffs nudist publications as smut and obscene, in a false and malicious manner, and characterized the plaintiffs as dealers in smut and obscenity.

22. The plaintiffs aver that the articles, pictures, stories and broadcasts of the defendants, The Evening Bulletin, Triangle Publications, Inc., Columbia Broadcasting Systems, Inc., are wholly false.

23. The defendants, as alleged in the preceding paragraph, at the time of their respective publications knew or should have known that the statements contained therein were untrue.

24. As a result of the action of The Evening Bulletin, Triangle Publications, Inc., Columbia Broadcasting Systems,

Inc. aforesaid, the plaintiffs have been and are greatly injured in their good name, credit and reputation, all of which have been and will be, to their great financial loss and damage.

25. The plaintiff, George A. Rosenbloom avers that he is not guilty of possessing or distributing obscene literature and that as a result of said charge, his reputation and character have been greatly damaged.

26. The above said arrest was made at the instance of the defendants, City of Philadelphia, Howard R. Leary, through their agents, servants and employees, maliciously and without reasonable and probable cause.

27. The plaintiff, George A. Rosenbloom avers that he has been put to great expense by the employment of counsel to represent him in connection with the unjust charges brought by the said defendant, City of Philadelphia, through their agents, servants and employees against him, and he has been caused great humiliation, pain and suffering incident to his arrest; he avers further that his reputation and good character have been damaged by reason thereof, and he has suffered great financial damage by reason of the loss of his consumers caused by the said arrest.

28. The plaintiff, George A. Rosenbloom further avers that by reason of the wilful and malicious acts of the defendants as aforementioned, he, George A. Rosenbloom is entitled to punitive damages, in addition to compensatory damages, both of which he hereby claims of the defendants, as aforementioned.

29. Despite numerous requests by plaintiffs of defendants, City of Philadelphia, Howard R. Leary, James C.

Crumlish, Jr., the defendants have failed and refused to return any of said seized books and magazines, defendants herein contending that they have legally confiscated all of said material, thereby depriving plaintiffs of an opportunity to sell said magazines and books for profit, or to return to the national distributor, said books or magazines for credit.

30. The police officers, acting under the direction and authority of the Police Commissioner, possessed a document entitled "Warrant for Search and Seizure" which was invalid and illegal, in that it declared only that the said police officers might search for "obscene materials" which, under the Constitution of the United States, is insufficient authority for search and seizure.

31. As a result of the actions of the defendants, nearly all retail outlets in Philadelphia County have returned all the magazines and paper back books listed in paragraph 11 to plaintiffs and other magazines of a similar or like nature, thereby causing grave and irreparable harm to plaintiffs.

32. Defendants have adopted a criterion of obscenity which declares that nudity is obscenity. In addition, defendants have adopted and are enforcing a criterion that bare breasts or bare buttocks constitutes obscenity when appearing in a magazine or book.

33. Defendants, Police Commissioner and District attorney have illegally set themselves up as censors of magazines and books which may be distributed in Philadelphia County.

34. The actions of the defendants have caused, and unless restrained will continue to cause, plaintiffs irreparable harm, damage and injury.

35. The actions of defendants City of Philadelphia, Howard R. Leary, James C. Crumlish, Jr., constitute a prior restraint on communication, set up a censorship of magazines and books, and render herein defendants as censors of magazines and books for the County of Philadelphia, all in violation of the rights of the plaintiffs under the provisions of the First and Fourteenth Amendments to the Constitution of the United States.

36. The actions of defendants City of Philadelphia, Howard R. Leary, James C. Crumlish, Jr., violate the rights of freedom of speech and of pross of plaintiffs and constitute a denial of the freedom of expression guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

37. The actions of the defendants City of Philadelphia, Howard R. Leary, James C. Crumlish, Jr., deprive plaintiffs of valuable property rights without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, in that plaintiffs are prevented from continuing to engage in the lawful business of the wholesale sale and distribution of magazines and books in Philadelphia County.

38. The actions of defendants City of Philadelphia, Howard R. Leary, James C. Crumlish, Jr., are arbitrary, unreasonable, and in excess of duly constituted legal authority and without any basis in law.

39. Plaintiffs believe and aver that defendants, City of Philadelphia, Howard R. Leary, James C. Crumlish, Jr., have exceeded their lawful powers and by their arbitrary action, have caused irreparable injury to plaintiffs' rights, whereby plaintiffs are entitled to apply to equity for an

injunction against defendants, enjoining defendants from continuation of the prior practices, procedures and conduct.

WHEREFORE, plaintiffs ask judgment and relief of this Court as follows:

(a) Declaring that none of the various issues of the magazines and books as enumerated in paragraph 11 of this Complaint constitutes hard-core pornography, or is obscene, or is subject to governmental suppression, in accordance with the definition of obscenity as established by the United States Supreme Court, in the case of *Roth vs. United States, 554 U. S. 476 (1957)* consistent with the guarantees of the Federal Constitution.

(b) Directing and ordering City of Philadelphia, Howard R. Leary, James C. Crumlish, Jr., their employees, subordinates and agents, and all persons acting for or in their behalf and in concert with them to restrain from directly or indirecly threatening the plaintiffs, their agents, employees, customers or prospective customers and other outlets for magazines and periodicals sold by he hereinmentioned plaintiffs with the institution of any suit, criminal or civil, arrest or seizure of merchandise, or instituting a multiplicity of suits against the herein mentioned plaintiffs, their vendees or successors, based upon the sale, purchase, display or possession of any nudist magazines or publications as enumerated in paragraph 11 of this Complaint.

(c) Directing and ordering City of Philadelphia, Howard R. Leary, James C. Crumlish, Jr., to return to the plaintiffs the said magazines and books which they have confiscated from the plaintiffs as alleged in paragraph 16 and 17 of this Complaint.

(d) In issuing an Injunction preliminarily, and then permanently, enjoining the defendants from continuing the acts, conduct and charges hereinbefore complained of.

(e) Issuing an Injunction preliminarily, and then permanently, enjoining defendants, The Evening Bulletin, Triangle Publications, Inc. Columbia Broadcasting Systems, Inc. from publishing statements, stories, pictures and broadcasts wherein they refer to the conduct of the plaintiffs herein as dealing with smut and obscene literature.

(f) Declaring that the actions of City of Philadelphia, Howard R. Leary, James C. Crumlish, Jr., violate the rights of freedom of speech and of press of plaintiffs, contrary to the provisions of the First and Fourteenth Amendments to the Constitution of the United States.

(g) Declaring that the actions of City of Philadelphia, Howard R. Leary, James C. Crumlish, Jr., deprived the plaintiffs of valuable property rights, without

(h) Entering a judgment against the defendants in favor of the plaintiffs for damages sustained, which damages plaintiffs aver will aggregate in excess of One Million ($1,000,000.00) Dollars.

(i) For such other and further relief as may be deemed appropriate by this Honorable Court to your plaintiffs may in justice and equity and right be entitled.

And plaintiffs will ever pray, etc.

BENJAMIN PAUL
BENJAMIN PAUL
Attorney for Plaintiffs

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.*

GEORGE A. ROSENBLOOM, being duly sworn according to law, deposes and says that he is one of the plaintiffs in the foregoing Complaint in Equity, and the facts set forth therein are true and correct, to the best of his knowledge, information and belief.

GEORGE A. ROSENBLOOM

Sworn to and subscribed
before me this 14 day
of October, A. D., 1963

(name illegible)

EXHIBIT D-2.

THE EVENING BULLETIN
Philadelphia
Tuesday October 1, 1963

POLICE RAIDERS ARREST 21 IN SALE OF SMUT

5,000 Books and Magazines Are Confiscated

Twenty newsdealers and one distributor were arrested this afternoon by Capt. Clarence Ferguson's special squad for alleged sale of pornographic literature.

The officers confiscated 5,000 books and magazines from newsstands. An additional 1,000 were taken from a truck parked at 15th and Market sts.

Ferguson said the truck belonged to George Rosenbloom 56, of 1852 Nestor st. Rosenbloom was arrested while making deliveries at that location.

Ferguson said the raids were the result of a two-month investigation. He said the investigation was ordered by Police Commissioner Howard Leary.

Location of Raids

Most of the raids were conducted in center city and in West Philadelphia.

At 52d and Market sts. the operators of newsstands on all four corners were taken into custody. Other raids were staged at 11th and Market sts. and 13th and Market sts.

The raids began at 11 A. M. and were concluded at 2 P. M.

The defendants were taken to Ferguson's headquarters, 22d and Hunting Park av. and then to the 17th st.

and Montgomery av. police station for slating.

All will receive hearings there tomorrow. They were charged with selling and possessing obscene material.

Mostly Magazines

The confiscated material consisted chiefly of illustrated magazines which sell for as much as $2.50, Ferguson said.

Two of the suspects operate stores, the remainder have newsstands. The shopkeepers are Charles Ciaverelli, 60, at Broad st. and Girard av. and Felix Henry, 61, of 5th st. and Allegheny av.

The newsdealers and the locations of their stands are:

Isadore Markowitz, 53, northwest corner Germantown and Lehigh avs.; Frank Savage, 31, southeast of 13th and Market sts.; Manual Nelson, 54, northeast 13th and market sts.; * * * 12th and market sts.; Kernel Goldberg, 37, southeast 15th and market sts.

Others Listed

Also, Marvin Barrish, 21, southeast, 9th and Market sts.; Joseph Altamuro, 28, southwest, 10th and Chestnut sts.; Joseph Schmuckler, 42, northeast, Broad and Arch sts.; Jacob Guard, 50, southwest, 16th and Market sts.; Benjamin Sorkin, 49, northwest, 13th and Market sts.; John Scullin, 62, northeast, 52d and Market sts.; Phillip Bressler, 47, southeast, 15th and Market sts.; Barnett Sobel, 51, northwest, Broad and Locust sts.

Also, Harry Golden, 56, northeast, 60th and Market sts.; Michael Mancuso, 55, southwest, 52d and Market sts.; George Shoot, 71, southwest, 52d and Market sts.; Allen Rosen, 42, northwest, 52d and Market sts.; and Benjamin Segal, 51, southwest, 52d and Baltimore av.

PLAINTIFFS' REQUESTED INSTRUCTIONS

1.

The faithful performance of your duties as jurors is essential to the administration of justice.

It is my duty as Judge to inform you of the law applicable to this case by instructions and it is your duty to accept and follow them as a whole, not singling out one instruction to the exclusion of others. You should not consider any rule of law with which you may be familiar unless it is included in my instructions.

It is your duty to determine the facts from the evidence produced in this trial. You are to apply the law as contained in these instructions to the facts and render your verdict upon the evidence and law. You should not permit sympathy, prejudice, like or dislike of any party to this action or of any attorney to influence your findings in this case.

The evidence you should consider consists of testimony of witnesses and exhibits offered and received. The production of evidence in court is governed by law. You should accept without question the rulings of the judge as to the admissibility or rejection of evidence offered, drawing no inferences that by the rulings made, the judge is in any manner indicating his views on the merits of the case.

2.

In considering the evidence in this case you are not required to set aside your common knowledge, but you have a right to consider all the evidence in the light of your own observations and experiences in the affairs of life.

3.

A party who has the burden of proof on a proposition must establish it by a preponderance of the evidence, unless

the proposition is so established by other proof in the case. "Preponderance of the evidence" means the greater weight of evidence. The greater weight of evidence is not necessarily established by the greater number of witnesses testifying to any fact or state of facts. It is evidence which, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If, upon any issue in the case, the evidence appears to be equally balanced, or if you cannot say upon which side it weighs heavier, you must resolve that question against the party who has the burden of proving it.

4.

A fact in dispute may be proved by circumstantial evidence as well as by direct evidence. A fact is established by direct evidence when, for example, it is proved by witnesses who testify to what they say, heard or experienced. A fact is established by circumstantial evidence when its existence can be reasonably inferred from other facts proved in the case.

5.

The publications complained of are libelous per se as a matter of law.

6.

The law respects the good name and reputation of every individual, and any written false publication of and concerning such individual which in and of itself tends to injure that reputation entitles the individual to damages for the wrong.

7.

Words in a written speech broadcast by radio constitute libel rather than slander.

8.

To render a defamatory statement actionable, it is not necessary that the charge be made in a direct, positive, and open manner. If the words used, when taken in their ordinary acceptation, convey a degrading imputation, no matter how indirectly, they are libelous, and it matters not how artfully their meaning is concealed or disguised.

9.

In printed, written or radio broadcast statement which falsely and maliciously charges another with the commission of a crime is libelous per se.

10.

In the case of words actionable per se, their injurious character is a fact of common notoriety, established by the general consent of men, and the court consequently takes judicial notice of it. They necessarily import damage, and therefore in such cases general damages need not be pleaded or proved, but are conclusively presumed to result; nor need special damage be shown in order to sustain the action. In such cases the defamation is such that in its natural and proximate consequences it will necessarily cause injury to the person concerned in his personal, social, official, or business relations of life, so that legal injury may be presumed or implied from the bare fact of the publication itself. Moreover, malice is presumed as a matter of law in such cases.

11.

The intent and meaning of an alleged defamatory statement must be gathered not only from the words singled out as libelous but from the context; all of the parts of the publication must be considered in order to ascertain the true

meaning, and words are not to be given meaning other than that which the context would show them to have.

12.

A mere expression of opinion or of a suspicion or belief may be actionable. For example, the statement, "I have every reason to believe," or "I believe," that the plaintiff has committed a crime is actionable even though it is not a positive assertion. So also, the fact that a defamatory statement is prefaced by the words, "*it is alleged*," does not deprive such statement of its actionable character. Similarly, the use of the words, "it is reported," has been declared to be equivalent to the assertion that there is a well-founded report which the publisher, after due inquiry and investigation, believes to be true, and hence to amount to a direct charge.

13.

A person is held liable for the publication of defamatory words in regard to another, even though he is only repeating what he has heard and names his authority and even though the repetition is made without any design to extend the circulation of the defamation or to cause the person to whom it is addressed to believe it to be true, the principal being that a person who repeats slander heard from others indorses it.

14.

A person is presumed to intend the natural consequences of his own acts, and hence, where the words uttered are free from ambiguity, the question of the intent with which the defendant made his publication is in truth irrelevant.

15.

Where the words used have such a relation to the profession or occupation of the plaintiff that they directly tend to injure him in respect to it, or to impair confidence in his character or ability, they are actionable, although not applied by the speaker to the profession or occupation; such words are actionable per se, without proof of special damage.

16.

Defamations which are actionable per se as in this case where your determination is concerned with a radio broadcast which in your findings may be libelous or in your determination that the words spoken here about the plaintiff was the imputation of a crime, injury is conclusively presumed.

17.

The law accords to all persons who have suffered injury by reason of the wrongful and unprivileged publication of a libel or a slander the right to recover damages and this right can neither be abridged by statute, nor lost by reason of difficulty in determining the amount that should be awarded.

18.

As in other cases of tort injury, there are two general classes of compensation damages allowable for defamation:

(a) General damages or those which the law presumes to be the natural, proximate, and necessary result of the publication; and

(b) Special Damages or those which although a natural and probable consequence thereof, are not assumed to be necessary or inevitable, must be shown by allegation and proof.

19.

In the assessment of general damages, it is generally held that future as well as accrued damages should be included in the award.

20.

The victim of a libel or slander is entitled to recover for injuries proximately resulting therefrom to his business, such as a loss of customers, or a diminution in trade and that such right of recovery extends to such future losses as can be shown with reasonable certainty.

21.

Where the defamation complained of is actionable per se, damages will be awarded in a substantial amount.

22.

In the assessment of general damages, such factors as the nature of the imputation made, the circumstances surrounding its publication, the quantum of mental anguish traceable thereto, and the general status and position of the parties, may all be taken into consideration.

23.

The victim of a defamation which is actionable per se can recover the general damages without proof of loss or injury which is conclusively presumed to result from the defamation. He is not required, in order to recover the general damages, to make proof of any special damages that may have accompanied them, although he is at liberty to prove them if he desires.

24.

Since the proximate and necessary consequence of a defamatory publication is injury to the feelings, reputation or business of the person defamed, compensation for such injury is recoverable as general damages.

25.

Injury to the reputation of the plaintiff is not the sole element of injury; the jury has a right to consider also the mental suffering of the person defamed.

26.

If the jury finds that defendant, in publishing the article complained of, was motivated by personal ill will or was guilty of such gross negligence and carelessness as to indicate a wanton disregard of plaintiff's rights, it may award plaintiff punitive damages in addition to compensatory damages.

27.

Punitive damages are sometimes referred to as "exemplary damages" or "smart money" and are imposed to deter the defendant from future libelous publications.

28.

The amount of such punitive damages shall be in addition to that awarded as compensation for plaintiff's injuries.

29.

Punitive damages are allowed in proper cases by way of punishment or penalty to the defendant and to deter others from committing acts of a like nature. In fixing punitive damages the jury acts without yardstick. It merely determines what amount will sufficiently accomplish the purposes for which such damages are allowed. In other words, it

determines what amount will not only punish the defendant for his wrong, but will also stand as an example or warning to others. (If the defendant is to be punished, his financial standing is important to determine what will be a sufficiently heavy penalty to act as punishment. For this reason, the plaintiff has introduced evidence showing the defendant's pecuniary condition. If you decide to award punitive damages, you should consider this evidence in arriving at a proper punitive figure.)

30.

One is privileged to publish the actual facts as to the commission of a crime and the facts as to the arrest and charges made against a person suspected of the crime provided the statement does not go further than a mere report of the news by making charges, directly or by inference, insinuation, or assumption that the person arrested is guilty of crime. If the account does go beyond a mere narration of the transaction recounted and makes injurious reflections on the private or business character of a party to the transaction, it is actionable if untrue.

31.

The privilege of fair comment on matters of public interest do not extend to mis-statements of fact, even though made without malice and in the honest belief that they are true.

32.

In order to be deemed privileged, comment on a matter of public interest must be fair. It is unfair if it goes further than the action or the acts commented on warrant, or if it makes unfair exaggerations; it is fair only when it confines itself to things or to the acts or conduct of persons, and comment going so far as to attack personal character or to impute immoral or corrupt motives is unfair and not privileged.

33.

Even though the occasion on which a defamatory statement is made may be privileged, such privilege may be lost if the statement goes beyond the publisher's duty or interest in the matter.

34.

"Excessive Privilege" is used with reference to communications which although relating to the occasion and the subject, are excessive because of their violent and improper nature. A communication may lose its qualifiedly privileged character by the use of language or a defamatory nature not warranted by the occasion that called for the publication.

35.

The privilege which originally attends a news report and a court proceeding is not absolute but may be forfeited by abuse, such as unfair and unwarranted comment.

36.

The accounts of proceedings in courts which news media are privileged to print are plain statements of and literal quotations from trials, given for the purpose of imparting information. Where news media, in printing an account of judicial proceedings, adopts a sensational style so that the plain object is to attract attention rather than to impart information, the benefit of the privileged communication is lost.

37.

News reports, to be privileged must refer to matters of legitimate news of which it is in the interest of the public to be formed, and not those in which the interest arises out of idle curiosity and vitiated appetite for the prurient and sen-

sational. The report of transaction must be fair and true for an unfair and exaggerated report may work a forfeiture of the privilege.

38.

False comments concerning a judicial proceeding are not privileged. The privilege does not extend to protect comments that are unwarranted by the facts shown at the proceedings.

39.

Where the publication charges an indictable offense, the presumption of innocence is prima facie evidence of falsity and want of probably cause, and sufficient to put the defendant to proof of the facts to support his claim of privilege.

40.

One who publishes both privileged and unprivileged matter concerning another is not relieved from liability for damages by the fact that there is no exact method of determining the quantum of injury attributable to the latter.

41.

Under all the law and evidence, the defendant was not privileged to broadcast any of the statements which indicated that the plaintiff was either involved with crime or had committed crimes.

42.

Under all the law and evidence, your verdict must be for the plaintiff and against the defendant.

Respectfully Submitted,

PAUL, GREENBERG & SANDERS
By BENJAMIN PAUL
BENJAMIN PAUL
Attorney for Plaintiff

DEFENDANT'S REQUESTS FOR INSTRUCTIONS

Defendant, Metromedia, Inc., requests the Court to give the jury the following instructions:

1. The plaintiff has the burden of proving that the statements of which he complains were defamatory.

2. Slight inaccuracies of expression are immaterial.

3. Expressions of opinion, even if they carry some exaggeration, are not defamatory.

(See *Scott-Taylor Inc. v. Stokes*, 425 Pa. 426 (1967).)

4. The publication of a report of judicial proceedings is privileged, although it contains matter which might be false and defamatory, if it is

(a) accurate and complete or a fair abridgement of such proceedings, and

(b) not made solely for the purpose of causing harm to the person defamed.

(See *Restatement, Torts* § 611.)

5. Reports as to police investigations and alleged commission of crimes are within the privilege.

(See *Stice v. Beacon Newspaper Corp.*, 340 P. 2d 396 (Kan. 1959).)

6. Minor inaccuracies do not defeat the privilege.

(See *Sciandra v. Lynett*, 409 Pa. 595 (1963).)

7. There is no abuse of the privilege by publication of false and defamatory matter if the publisher has reasonable grounds for believing that it is true.

8. Absent malice, a news medium reporting as to a matter of public concern cannot be liable for defamation because there is a profound national principle that debate on public issues should be uninhibited, robust and wide-open.

(See *New York Times v. Sullivan*,
376 U. S. 254, 270 (1964).)

9. The guarantees of free speech and free press go beyond comment upon public officers and extend to significant matters of public interest.

(See *Time, Inc. v. Hill*,
385 U. S. 374 (1967).)

10. Unless you find that the news broadcasts were highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers, you should find for the defendant.

(See *Curtis Publishing Co. v. Butts*,

18 L. Ed. 2d 1094, 1113 (1967).)

11. You should disregard the testimony of Daniel Chuse concerning the WIP broadcast because it was not related to the plaintiff.

12. The privilege of fair comment on matters of public interest includes the right to make statements of opinions or conclusions, if made without malice or gross disregard of the facts and if made in the honest belief that they are true.

13. If you find that the WIP broadcasts were privileged and no part of the broadcasts was an abuse of privilege, your verdict should be for the defendant.

14. Even if you find some parts of the WIP broadcasts were outside the privilege, you still may return a verdict for the defendant if you find that the plaintiff's alleged harm came from the privileged parts of the broadcasts and no additional harm came from the other parts of the broadcasts.

15. A determination in a criminal case that certain material is obscene is based on the record in that case and requires a degree of proof beyond any reasonable doubt, whereas in the present civil case only a preponderance of evidence is required for a determination that a periodical is smut or obscene.

16. If you find that the periodical entitled "Eden" distributed by the plaintiff and which you examined has a dominant theme which to the average person, applying contemporary community standards, as a whole appeals to prurient interest, you should find that it is obscene.

(*Cf. Roth v. United States,*
354 U. S. 476, 489 (1957).)

17. While loss of profits need not be proved with mathematical precision, they cannot be proved by mere speculation, guess or conjecture.

18. Once you have observed the plaintiff tell an untruth upon the witness stand, you may assume that some or all of his other testimony was false.

19. In this case, the plaintiff has the burden of proving the application of the alleged defamatory statements to him.

(See, *Restatement, Torts* § 613(1)(c).)

20. In this case, the plaintiff has the burden of proving the recipient's understanding of the defamatory statement as intended to be applied to the plaintiff.

(See *Restatement, Torts* § 613(1)(e).)

21. In this case, the plaintiff has the burden of proving abuse of the conditional privilege.

(See *Rankin v. Phillippe*, 206 Pa. Super. (1965).)

22. Under all of the evidence properly before you, you should find for the defendant.

23. As a matter of law, you should find for the defendant.

Respectfully submitted,

ISRAEL PACKEL
E. GERALD DONNELLY, JR.
ISRAEL PACKEL
Attorneys for the Defendant

OF COUNSEL:
FOX, ROTHSCHILD,
O'BRIEN & FRANKEL

JUDGMENT

BEFORE HON. JOSEPH S. LORD, III;

AND NOW, to wit: January 26th, 1968, in accordance with the Verdict of the Jury, it is

ORDERED that Judgment be and the same is hereby entered in favor of George A. Rosenbloom, Plaintiff, and against Metromedia, Inc., Defendant, for Damages in the sum of Twenty Five Thousand and 00/100 ($25,000.00) Dollars, and for Punitive Damages in the sum of Seven Hundred Twenty Five Thousand and 00/100 ($725,000.00) Dollars, together with costs.

BY THE COURT:
ATTEST:
ROBERT MEISTERING
DEPUTY CLERK

DEFENDANT'S MOTION FOR NEW TRIAL

Defendant moves the court to set aside the verdict and the judgment entered on January 26, 1968, and to grant a new trial on the following grounds:

1. The court erred in instructing the jury that defendant's Exhibit No. 1, from a criminal standpoint, was not obscene as a matter of law.

2. The court erred in admitting evidence that many months after the broadcasts the plaintiff was acquitted of the charge of possession of obscene literature.

3. The court erred in refusing defendant's requests for instructions Nos. 8, 9, 10 and 12 with respect to the defendant's constitutional right to report and comment on public issues and matter of public interest.

4. The court erred in instructing the jury that mere negligence would be sufficient to constitute an abuse of the defendant's privilege to report and comment on the news.

5. The court erred in admitting hearsay: (a) as to alleged defamatory statements; and (b) as to the causal effect with respect to the defamation alleged.

6. The court erred in refusing to charge that minor and insubstantial inaccuracies did not constitute an abuse of the defendant's privilege.

7. The court erred in refusing defendant's request for instruction No. 11 that the indefinite testimony of Daniel Chuse, the only witness called by the plaintiff other than himself and Paul Rust, should be disregarded.

8. Counsel for plaintiff conducted himself improperly in arguing to the jury in highly inflammatory and prejudicial terms, including among other things a reference to the defendant as an octopus squirting black ink, and the court did not admonish counsel or instruct the jury to disregard such statements.

9. There was no proof of actual damage to the plaintiff caused by the broadcasts and hence, a verdict for punitive damages is erroneous.

10. There was no evidence of malice or outrageous conduct by any employee of the defendant and accordingly, the court erred in instructing the jury that it could find punitive damages.

11. There was no evidence which could be the basis for the imposition of penal damages on the defendant as an employer.

12. The verdict is contrary to the law.

13. The verdict is excessive.

14. The verdict is contrary to the evidence.

15. The verdict is contrary to the weight of the evidence.

Defendant reserves the right to assign additional reasons in support of this motion after the notes of testimony have been transcribed.

ISRAEL PACKEL
E. GERALD DONNELLY, JR.
ISRAEL PACKEL
Attorneys for the Defendant

OF COUNSEL:
FOX, ROTHSCHILD,
O'BRIEN & FRANKEL

DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Defendant moves the court to set aside the verdict and judgment entered on January 26, 1968, and to enter judgment in accordance with the defendant's motion for a directed verdict. Defendant's motion for a directed verdict should have been granted because:

1. The defendant had a privilege under the First and Fourteenth Amendments to the Constitution of the United States to report and comment on the two public issues involved and there was no evidence sufficient to defeat the constitutionally mandated privilege.

2. There was no evidence that the defendant's qualified privileges to report and comment on the news had been abused.

3. There was no evidence that the first series of broadcasts on October 4 and 5, 1963, as heard and understood by any listener, constituted anything more than reports of the plaintiff's arrest, the basis therefor and the conduct of the police incidental thereto.

4. No listener of the broadcasts testified nor was there any other evidence, except the plaintiff's hearsay, that the later broadcasts on October 21 and 26, 1963 and November 1, 1963, were identifiable to the plaintiff.

5. The broadcasts, even if they were deemed to be disparagements of plaintiff's magazines or of his conduct in distributing the magazines for the public, constituted privileged criticism.

ISRAEL PACKEL
E. GERALD DONNELLY, JR.
ISRAEL PACKEL
Attorneys for the Defendant

OF COUNSEL:
FOX, ROTHSCHILD,
O'BRIEN & FRANKEL

ADDITIONAL REASONS FOR A NEW TRIAL

Pursuant to the reservation, as set forth in the timely motion for a new trial, to assign additional reasons for a new trial after the Notes have been transcribed, and in conformity with Rule 59(d) as amended July 1, 1966, the defendant sets forth the following additional reasons for a new trial:

16. The court did not charge the jury that an award of penal damages must bear a reasonable relationship to the amount of the actual damages.

17. The court determined that it was bound by a common pleas decision of one court (N. T. 342) and had placed in the record that the magazines were not obscene as a matter of Pennsylvania law (N. T. 307).

18. The court did not permit any testimony as to the practice in the community with respect to checking up stories carried by radio stations (N. T. 395).

19. The court permitted testimony about hard core pornography in a completely unrelated matter (N. T. 44).

20. The court permitted, without proper foundation, projections of gross profits of $512,188.15 per year and net profits of $35,000 per year (N. T. 256).

21. The court charged the jury that if they find for the plaintiff, two amounts should be brought in, one for general damages and one for punitive damages (N. T. 513, 514).

22. The court permitted contradiction of defendant's witness on a collateral matter (N. T. 413).

OF COUNSEL:
FOX, ROTHSCHILD,
O'BRIEN & FRANKEL

ISRAEL PACKEL
ISRAEL PACKEL
Attorney for the Defendant

OPINION

JOSEPH S. LORD, III, J. August 28, 1968

This is an action for libel. The plaintiff, a citizen of Pennsylvania, was at the time of the events which gave rise to the present action a distributor of nudist magazines in a territory including Philadelphia and the surrounding area. The defendant, Metromedia, Inc., a Delaware corporation with its principal place of business in New York, owns and operates a radio station in Philadelphia known as WIP.

The jury rendered a verdict in favor of the plaintiff of general damages in the sum of $25,000 and punitive damages in the sum of $725,000. The defendant has filed motions for judgment notwithstanding the verdict, or, in the alternative, for a new trial.

The asserted liability of the defendant was based upon two series of broadcasts in the fall of 1963. The first series, October 4 and 5, dealt with raids on the plaintiff's home and warehouse and his arrest by the Special Investigations Squad of Philadelphia Police Captain Clarence Ferguson. The first broadcast was that of October 4, 1963 at 6:00 p.m.:

"City Cracks Down on Smut Merchants

"The Special Investigations Squad raided the home of George Rosenbloom in the 1800 block of Vesta Street this afternoon. Police confiscated 1000 allegedly obscene books at Rosenbloom's home and arrested him on charges of possession of obscene literature. The Special Investigations Squad also raided a barn in the 2000 block of Welsh Road near Bustleton Avenue and confiscated 3000 obscene books. Captain Ferguson says he believes they have hit the supply of a main distributor of obscene material in Philadelphia."

The substance of this broadcast was repeated seven more times. The only difference of any significance was that in the last six the script added the word "reportedly" or "allegedly" in referring to the books seized in the barn.

The second series, October 21, 25 and November 1, involved the plaintiff's action for an injunction against the allegedly illegal arrests and the publicity thereof. The broadcast of October 21, 1963, at 8:30 a.m. is representative:

> "Federal District Judge Joseph S. Lord, III,[1] will hear argument today from two publishers and a distributor, all seeking an injunction against Philadelphia Police Commissioner Howard Leary, District Attorney James C. Crumlish, Jr., a local television station and a newspaper, ordering them to lay off the smut literature racket. "The girly-book peddlers say the police crackdown and continued reference to their borderline literature as smut or filth is hurting their business. Judge Lord refused to issue a temporary injunction when he was first approached. Today he'll decide the issue. It will set a precedent and if the injunction is not granted it could signal an even more intense effort to rid the city of pornography."

At 9:30 a.m. on the same day, defendant's broadcast was:

> "Smut distributors seek an injunction against police raids in Philadelphia."

All of the broadcasts in this series were replete with repeated references to "smut" and "girlie books". Furthermore, the plain implication of the broadcasts was that the plaintiffs in the Federal Court were atempting to halt the

1. The judge in question was in fact the Hon. John W. Lord, Jr.

general campaign against pornographic literature. The unmistakable inference was that plaintiffs wanted to stop all raids throughout the city, even as against literature that was, in fact, pornographic and even though they had nothing to do with its distribution. Thus, at 2:00 p.m. on October 21, defendant described the plaintiffs as:

> "• • • asking an injunction against further raids by police and the District Attorney's office on smut publications. The complainants charge they were being hurt financially. • • •"

Again (October 21 at 4:30 p.m.), the broadcast had complainants going before "Judge Gold"[2]:

> "• • • claiming they are suffering economic and financial hardship because of a recent crackdown on smut material."

The suit (*Outdoor American Corp., et al. v. City of Philadelphia,* et al. C. A. No. 34316) was, in fact, only concerned with plaintiffs' publications. It asserted that the publications were not obscene and sought to protect only their own assertedly lawful business.

There is no evidence of what investigation was conducted by defendant other than a reliance on Captain Ferguson for the first series of broadcasts. Captain Ferguson, who had never been to the Philadelphia Art Museum and who was uncertain of its location, conceived of obscenity as:

> "A. Any time the private parts is [sic] showing of the female or the private parts is [sic] shown of males and they are offered for sale to the public, that is what I consider the answer, Mr. Paul."

---

2. A Common Pleas Court judge not involved at all.

I.

New York Times Company v. Sullivan, 376 U. S. 254 (1964), laid down the First Amendment rule applicable to libel actions by public officials (376 U. S. at p. 279-80):

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. * * *"

Curtis Publishing Co. v. Butts, 388 U. S. 130 (1967) considered the impact of *Sullivan* on suits brought by those who are not public officials, but who are "public figures". In that case, Mr. Justice Harlan enunciated a rule formulated somewhat differently from that of *Sullivan*. The Chief Justice, in Part I of his concurring opinion, said (388 U. S. at p. 164):

> "I therefore adhere to the New York Times standard in the case of 'public figures' as well as 'public officials.' * * *"

Four other Justices concurred in Part I of the Chief Justice's opinion. It may therefore be said that the *Sullivan* standard is applicable to cases of "public figures". See *Cepeda v. Cowles Magazine and Broadcasting, Inc.*, 392 F.2d 417 (C. A. 9, 1968), at page 421. The question is does it apply here, a question that is by no means free of difficulty.

In *Butts*, Mr. Justice Harlan said, at page 133:

> "* * * We brought these two cases here * * * to consider the impact of that decision [Sullivan] on libel actions instituted by persons who are not public officials, but who

> are 'public figures' and involved in issues in which the public has a justified and important interest. * * *"

It would thus appear that, having referred to the "figures" and the "issues" in the conjunctive, the Court intended the scope of *Butts* to reach only those cases where both the criteria of a public figure and a public issue were satisfied. And if this is so, we would have no difficulty in concluding that *Butts* does not govern here. George Rosenbloom was not, before defendant's onslaughts, a public figure. Unfortunately, Justice Harlan did not stop with the neat formulation of the reach of *Butts*. Footnote 19 (388 U. S. at p. 155) reads:

> "Nor does anything we have said touch, in any way, libel or other tort actions not involving public figures *or* matters of public interest." (Emphasis added)

Is this later use of the disjunctive to be taken to mean that one not a public figure may nonetheless have to bear the heavy constitutional burden if he is libelled in a matter of "public interest"? We think not.

Application of the constitutional privilege in the law of libel requires a delicate balancing of the freedoms of speech and press on the one hand, and the right of the individual to be free from injury to his reputation by defamation on the other. It cannot be gainsaid that in substituting redress in the courts for violence as a means of vindicating personal rights the law of defamation serves a very useful social function, *Rosenblatt v. Baer*, 383 U. S. 75, 86 (1966), a function tion, no less important than that performed by the laws which provide compensatory redress for intentionally or negligently inflicted injury.

In restricting the ambit of recovery in libel actions brought by public officials and "public figures" the Supreme

Court has recognized that in light of the values served by the freedoms of speech and the press, certain persons are entitled to more protection than others from injuries to reputation. Underlying the recent decisions of the Court is the notion that by their activities and their status prominent persons have assumed to some extent the risk of injury due to negligently reported falsehoods and because of their access to the media of mass communication are able to protect themselves from such injuries more adequately than others. In *Butts* Justice Harlan adverted to "'the hypothesis that speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies,' Dennis v. United States, 341 U. S. 494 * * *." 388 U. S. at 153. Noting that in personal injury cases the courts have "given much attention to the importance of defendants' activities," the Justice said that "[t]he courts have also, especially in libel cases, investigated the plaintiff's position to determine whether he has a legitimate call upon the court for protection in light of his prior activities and means of self-defense." 388 U. S. at 154. In describing the two respondents in *Butts* and *Walker*, Justice Harlan said (388 U. S. at 154-155):

> "* * * [B]oth Butts and Walker commanded a substantial amount of independent public interest at the time of the publications: both, in our opinion, would have been labeled 'public figures' under ordinary tort rules. * * * Butts may have obtained that status by position alone and Walker by his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy, but ***both commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able 'to expose through discussion the falsehood and fallacies' of the defamatory statements.*** Whitney v. California, 274

U. S. 357, 377 (Brandeis, J., dissenting)." (Emphasis added)

The Chief Justice, in his concurring opinion, described these "public figures" as individuals who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." 388 U. S. at 164. "And surely as a class these 'public figures' have as ready access as 'public officials' to mass media of communication, both to influence policy and to counter criticism of their views and activities." *Id.*

We may concede that the suppression of crime is a matter "in which the public has a justified and important interest." *Butts, supra.* However, we must also conclude that the libelee's access to means of public rebuttal of public libel is an important, if not essential factor in determining the application *vel non* of the constitutional standard. Speech cannot rebut speech nor propaganda answer propaganda where millions of listeners are available to one side, and the other side finds the telephone hung up when he attempts to protest. Such a brobdingnagian-lilliputian contest is scarcely calculated "to strike a fair balance beween the interests of the community in free circulation of information and those of individuals in seeking recompense for harm done by the circulation of defamatory falsehood." *Butts, supra,* at p. 153.

The Supreme Court has not yet adopted First Amendment ansolutes. *Cf.* Justice Black's concurring opinion in *New York Times Company v. Sullivan,* 376 U. S. at 293. And yet, to insist upon the application of a constitutional standard under circumstances such as these would mean that a person, even though not a public figure, who is accused of crime, however negligently and however falsely, would be denied redress in the courts. We think the philosophy underlying the Supreme Court's opinion precludes such a drastic result.

Rosenbloom was in no sense a public man. Indeed, he was of so little importance that when he approached the defendant seeking a hearing to prove to those in charge that his magazines were neither obscene, nor smut, nor "girlie-books", he was summarily cut off and ignored. Rosenbloom was isolated from public view until others had thrust him into it, and when the news media finished with him he was in a very real sense defenseless save to the extent that the libel law of Pennsylvania afforded him protection. We conclude, therefore, that because of his public anonymity, which precluded meaningful access to the news media as a means of protecting his reputation, even though he was tangentially involved in a public issue, plaintiff is protected by Pennsylvania libel laws without First Amendment strictures.

II.

We turn, then, to Pennsylvania law.

The defendant argues that the court erred in its charge that the conditional or qualified privilege with which the defendant was clothed as a news medium reporting the news[3] could be abused by a showing of something less than actual malice.

In the first place, it is not at all clear that the privilege obtains in the report of a "judicial proceeding" when no "official action has been taken by the officer or body whose proceedings are thus reported." REST., TORTS, § 611, Comment C. However, assuming *arguendo* that the conditional privilege did attach, we cannot agree that only actual malice will overcome it.

"Want of reasonable care and diligence to ascertain the truth, before giving currency to an untrue communication,

3. Purcell v. Westinghouse Broadcasting Co., 411 Pa. 167 (1963); Rest., Torts, § 611.

will destroy the privilege * * *. *O'Donnell v. Philadelphia Record Co.*, 356 Pa. 307, 315 (1947). See also *Altoona Clay Products, Inc. v. Dun & Bradstreet, Inc.*, 367 F.2d 625 (C.A. 3, 1966); *Bausewine v. Norristown Herald, Inc.*, 351 Pa. 634, 645 (1945); *Mulderig v. Wilkes-Barre Times*, 215 Pa. 470, 474 (1906). And in *Purcell v. Westinghouse Broadcasting Co.*, 411 Pa. 167, 179 (1963), the court said:

> "* * * where libel is involved, malice is not necessarily synonymous with malignance of temper, vengefulness of spirit, or personal prejudice, attributes which usually go with 'malice' in non-legal parlance. Legal malice can generate from a reckless and wanton disregard of another's rights. It may arise from a 'want of reasonable care and diligence to ascertain the truth, before giving currency to an untrue communication.' The failure to employ such 'reasonable care and diligence' can destroy a privilege which otherwise would protect the utterer of the communication. (Montgomery v. Dennison, 363 Pa. 255)."

In addition, the defendant was not prejudiced by any putative error of the court in instructing that the jury could find an abuse of the privilege based on conduct less than malicious or reckless since in awarding punitive damages the jury applied the standard now urged on the court and found, and was warranted in finding, malice or recklessness. (See discussion under V, infra). "Although the 'actual malice' instructions were not also given in connection with the compensatory damage issue, it is difficult to conceive how petitioner could have been prejudiced by that failure in view of the fact that the jury, guided by 'actual malice' instructions, awarded $3,000,000 in punitive damages." *Curtis Publishing Co. v. Butts*, supra, at p. 166.

III.

The defendant moves that judgment be entered in its favor because there was no showing that the defamatory broadcasts caused the plaintiff any injury; because there was no proof that any listener believed the broadcasts to be defamatory; and because there was no proof that any listener believed that the plaintiff was the subject of the second series of broadcasts.

Where a publication is libelous *per se*—that is, defamatory on its face—it is actionable *per se;* one need not prove that he received any injury as a result of the publication in order to recover damages. "In such a case, general damages for loss of personal or business reputation are recoverable and no averments or proof of special damages are necessary." *Cosgrove Studio and Camera Shop, Inc. v. Pane,* 408 Pa. 314, 319 (1962). Compare, e.g., *Continental Nut Company v. Robert L. Berner Company,* 393 F.2d 283 (C. A. 7, 1968) (libel per quod).

Such words as "girly-book peddlers" and "smut peddlers" are defamatory on their face and "need no extrinsic proof of [sic] explanation." 408 Pa. at 319. It is immaterial, then, that the plaintiff introduced no evidence that any listener considered the broadcasts defamatory. "The jury determines whether a communication, capable of a defamatory meaning, was so understood by its recipient." REST., TORTS, § 614(2). See also *Weider v. Hoffman,* 238 F. Supp. 437 (M. D. Pa. 1965).

The defendant complains that the plaintiff offered the testimony of not a single witness that the second series of broadcasts, which did not identify the plaintiff by name, were taken to refer to the plaintiff. We left it for the jury to determine whether a reasonable listener, in view of all the circumstances, would have concluded that the broadcasts referred to plaintiff where they did not mention plaintiff by

name. This was in accord with the law of Pennsylvania.

In *Clark v. North American Co.*, 203 Pa. 346 (1902), the court said, at page 352:

> "• • • The proper way to submit it to the jury was to call their attention to the fact that the name used in the article did not refer to the plaintiff, but to one John Clark, a different person, but on the other hand the description pointed directly to the plaintiff and the jury should consider the whole article and determine from all the evidence, whether, notwithstanding the difference of name, the description was such either intentionally or by want of due care and diligence in ascertaining the true facts, that there would be a natural and reasonable inference that the plaintiff was the person referred to. If there would, the defendant was liable. • • •"

The jury was free to find that the second series of broadcasts referred to the plaintiff from the surrounding circumstances, to wit, that the plaintiff here was the plaintiff in the federal action which the broadcasts purported to report. The news director of WIP, Mr. Rust, was a broadcaster and a listener who knew that the second series of broadcasts was, and was intended to be, about the plaintiff. The law is clear that "[t]he fact that the plaintiff is not specifically named in the [publication] is not controlling. A party defamed need not be specifically named, if pointed to by description or circumstances tending to identify him: Burkhart v. No. American Co., 214 Pa. 39, 63 A. 410 (1906) • • •." *Cosgrove Studio and Camera Shop, Inc. v. Pane, supra,* at 319.

In *Burkhart, supra,* it was held that the plaintiff was sufficiently identified in an article which referred to a bassoon player in the orchestra where the plaintiff was the orchestra's only bassoon player. So here, it would appear that Rosenbloom was the only distributor of nudist maga-

zines in Philadelphia then in the process of seeking an injunction in the federal courts against raids.

IV.

The plaintiff was acquitted in his criminal trial springing from the arrest. The Pennsylvania court ruled as a matter of law that the magazines were not obscene. The admission into evidence of this acquittal and its use by the court are the bases of two assignments of error.

The defendant excepted to the court's charge that "Eden", the magazine purveyed by the plaintiff, was not obscene as a matter of law in the legal sense. See, *e. g.*, *Luros v. United States*, 389 F.2d 200 (C. A. 8, 1968). As to the defense of truth of defendant's characterization of "Eden" as "obscene," the court bifurcated the issue and instructed the jury that they must first decide whether the defendant used the word in the legal or in the lay sense. If they decided that it was used in the legal sense, the defense would fail. If used in the lay sense, the question of truth was for them to decide.

In its ruling that the magazines were not obscene in the legal sense as a matter of law, the court considered the opinion of Judge Ullman in the criminal prosecution in which the plaintiff was acquitted. We did so, however, not as a matter of applying state law under *Erie R. Co. v. Tompkins*, 304 U. S. 64 (1938), but in order to determine whether the defense of truth was sufficient to go to the jury. To the extent that this essentially factual question turned on the content of the state obscenity law, the court made a legal determination. What our instruction reflected was a finding, as a matter of law, that the defendant failed to sustain its burden of proof that the magazines were obscene in the legal sense. The defendant offers no argument in its present mo-

tions that convinces us that this charge was in any way erroneous.

A related assignment by the defendant is that the plaintiff was allowed to introduce evidence of his acquittal in the criminal case and that the admission of such evidence was erroneous and prejudicial. We cannot agree.

Throughout the trial the defendant presented to the jury its defense of truth, *i. e.*, that the magazines were indeed obscene and smut and that the plaintiff was properly yclept a "smut peddler", etc. To this end the defendant adduced evidence that the plaintiff had been arrested on two occasions for the sale of the magazines in question and prosecuted under the state's obscenity law.

It should be noted, moreover, that calling a person a smut peddler and a distributor of obscene literature clearly imputes the commission of a crime, especially when it is reported that an arrest therefor has been made. Thus, the persistent defense of truth itself operated to blacken the character of the plaintiff in the eyes of the jury, not just making him out to be a seller of dirty books, but also one who is not above committing crimes in order to make his livelihood.[4] It is unthinkable that the jury not know that the plaintiff had been acquitted of the charges against him. *Cf. Purcell v. Westinghouse Broadcasting Co., supra*, p. 183.

V.

The defendant argues that the award of punitive damages was improper because the evidence was insufficient that the defendant's conduct was malicious or reckless. The court properly charged on the law of Pennsylvania as to the standard for assessing punitive or exemplary damages:

4. There is authority that such persistence in the defense of truth may be evidence of the actual malice necessary for punitive damages. *Montgomery v. Dennison*, 363 Pa. 255, 267 (1949).

"Secondly, if you find that this publication arose from a bad motive or malice toward the plaintiff, or if you find that it was published with reckless indifference to the truth, if you find that it was not true, you would be entitled to award punitive damages, and punitive damages are awarded as a deterrent from future conduct of the same sort.

"They really are awarded only for outrageous conduct, as I have said, with a bad motive or with reckless disregard of the interests of others, and before you would award punitive damages you must find that these broadcasts were published with a bad motive or with reckless disregard of the rights of others, or reckless indifference to the rights of others; so that your verdict should be, if you find for the plaintiff, in two parts; one, general damages and, two, punitive damages."

See *Purcell v. Westinghouse Broadcasting C* 411 Pa. 167, 187 (1963).

To begin with, it is clear that no one at WIP harbored any personal animus toward the plaintiff George Rosenbloom. We are convinced, however, that there was sufficient evidence of a reckless disregard both of the truth of the defamatory assertions and the rights of the plaintiff to warrant the finding of punitive damages.

As the Pennsylvania Supreme Court said in *Clark v. North American Co.*, 203 Pa. 346, 354 (1902):

"There was evidence in the case on which the jury might have found punitive damages, and it was error to take that matter away from them. The refusal or neglect to publish a retraction as to plaintiff after he had called defendant's attention to the injustice done him was in itself sufficient, and in this connection the tone and wording of the article itself as indicative of a desire

to make a sensation, * * * were open for the consideration of the jury. * * *''

Here is what happened when plaintiff tried to call "defendant's attention to the injustice done him." Late in October of 1963, about the 26th or 27th, the plaintiff, after hearing about the broadcasts that WIP had made concerning him, visited the station's offices and asked to hear or read the broadcasts so that he might determine whether or not what he had heard was true. He spoke to representatives of the news department by means of a telephone in the reception area, and the conversation was mechanically recorded. He specifically asked to hear and was read the 12 o'clock news broadcast of October 21, 1963. What was read to him referred to smut peddlers.[5] When confronted with the article the plaintiff told the newscaster who read the broadcast to him, a man who identified himself as "Nate Wright", that the magazines in question "were found to be completely legal and legitimate by the United States Supreme Court." The plaintiff testified further as follows:

"And the voice came back, 'Well, the District Attorney said they are obscene.'

"I said, 'Are you sure you are quoting the District Attorney correctly because I have in my possession a public statement by the District Attorney that my magazines are completely legal, absolutely nothing obscene about them.'" (N. T. 175).

Thereupon, "Nate Wright" hung up.

There could be no more effective refusal to broadcast a retraction. Indeed, the jury may properly have thought (and we would agree) that this was even more reprehensible

5. The broadcast for that time in the record referred to *alleged* smut literature.

than a refusal to make a retraction. Plaintiff was not even accorded an opportunity to present his side of the story so that WIP could intelligently decide whether it should make a retraction. Such conduct is strong evidence of a lack of a good faith effort to ascertain the truth about the plaintiff and his business. It was a reckless disregard both of the truth of the previous broadcasts and of the rights of the plaintiff in the face of the plaintiff's representation that he was prepared to document his position that the District Attorney had stated that the magazines were not obscene.

Had WIP's representatives spoken with Mr. Rosenbloom or looked at the magazines and had still entertained an honest belief that the material was obscene or smut there might have been some basis for a finding that defendant was not reckless. But the abbreviated conversation with the plaintiff by telephone in defendant's offices, without confronting the plaintiff personally or examining the documentation he offered, was such depersonalizing conduct as to manifest a reckless disregard for a person in no position to make himself heard.

The conduct of WIP when approached by the plaintiff, sufficient in itself as a basis of liability for punitive damages under *Clark v. North American Co., supra,* was not the only evidence of a reckless disregard of the truth and of the rights of the plaintiff. The second series of broadcasts on October 21, 25 and November 1, describing a suit brought by the plaintiff to enjoin the raids and the reporting of them, contains defamatory assertions that were clearly false and was made at a time when the falsity of the assertions was readily ascertainable, both from an examination of the court records and of the magazines themselves. This is not then a case where a newsworthy incident occurs spontaneously and a news purveyor must rely on eyewitness accounts subject to the vicissitudes of human perception. *Cf. Associated*

Press v. Walker, supra. The facts about which the broadcasts revolved were essentially static: what kind of magazines did the plaintiff sell; what was the nature of the suit he brought to protect his business.

Content with its ignorance of facts which would have been revealed upon the examination of material evidence, WIP relied on hearsay, and knowing its information was hearsay (or worse, conjecture), had the temerity to report that Mr. Rosenbloom and the publisher were "girly-book peddlers" and "smut distributors". These words are so highly colored that they smack of editorializing and a desire to create a sensation.[6] The broadcast of such language to describe a magazine distributor, because of its great defamatory impact, supports part of "the basic theory of libel," that "words defamatory of another, are still placed 'in the same class with the use of explosives or the keeping of dangerous animals.' Prosser, The Law of Torts, § 108, at 792." *Curtis Publishing Co. v. Butts, supra,* at 152. The Jury could reasonably infer that the defendant was aware of this potential danger. It could properly conclude that the defendant's failure to examine material evidence which was available and yet to make such defamatory characterizations, knowing that such basic investigation had not been made, constituted a recklessness of conduct as to the rights of others sufficient to warrant punitive damages. Because the evaluation of the defendant's conduct necessitates an intrinsically subjective inquiry, we refuse to meddle with the fact-finding function of the jury.

---

6. Malice may sometimes be proved intrinsically. An instruction to the jury to find "whether the publication itself, in its tone and format, revealed such malice as robbed it of its privileged character" was upheld in *O'Donnell v. Philadelphia Record Co., supra,* at 316. Although this was the "malice" that destroys the privilege, the "tone and format" of WIP's broadcasts, coupled with the evidence of the failure to verify the information they received, was properly for the jury's consideration and sufficient to find recklessness here.

Defendant at no time sought separate rulings by the court on the two different sets of broadcasts. It is now in no position to complain that the first set may not have afforded the basis for punitive damages. Since defendant itself was content to treat its conduct as one ball of wax, it cannot now complain that it was so treated in the verdict. Any other result would mean that a defendant, confronted with two bases of recovery, one of which may be vulnerable and the other not, could sit back and await an unfavorable result confident that he could successfully attack the entire verdict. This is not the intendment of F. R. Civ. P. 50(a) which commands that "[a] motion for a directed verdict shall state the specific grounds therefor."

The defendant assigns as error the court's failure to charge that the award of punitive damages must have a reasonable relationship to the amount of compensatory damages in accordance with the law of Pennsylvania. The is the general rule in Pennsylvania[7] and apparently applies in libel cases as well.[8]

Although numerous points for charge were submitted by both sides, defendant made no request for such an instruction. At the conclusion of the charge, defendant excepted only to the submission of the question of punitive damages to the jury at all. The only "grounds of his objection," F. R. Civ. P. 51, were that this was not "a case in which there were facts for the jury to consider."

Federal Rule of Civil Procedure 51 provides that: "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." In

7. *Suflas v. Cleveland Wrecking Co.*, 218 F. Supp. 289 (E. D. Pa. 1963).

8. See *Purcell v. Westinghouse Broadcasting Co.*, 411 Pa. 167, 187 (1963).

Palmer v. Hoffman, 318 U. S. 109, (1942) the Court said, at page 119:

> "• • • In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the *precise nature* of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial. • • •" (Emphasis added)

Defendant's exception here not only fell short of suggesting substantive error in charge; indeed, it suggested that if punitive damages were recoverable, the charge was legally correct.

Nor is this a case of fundamental error going to the very issue of liability, as in the cases cited by defendant. *Mazer v. Lipschutz*, 327 F.2d 42 (C A. 3, 1964) (failure to charge on the vicarious liability of a surgeon); *Ratay v. Lincoln National Life Insur. Co.*, 378 F.2d 209 (C. A. 3, 1967) (erroneous charge that burden of proof for defense of fraud could be sustained by a fair preponderance of the evidence). *Suflas v. Cleveland Wrecking Co.*, 218 F. Supp. 289 (E. D. Pa. 1963) did not involve a determination of fundamental error. The only non-substantive point briefed, argued and decided in that case was whether the failure to charge on necessary relationship between compensatory and punitive damages was harmless error.

We are not here concerned with whether the error was harmless, but whether it was so fundamental that an entire new trial should be ordered, even though the only question would be the amount of punitive damages. For that question could not be determined without showing the totality of the circumstances. And this, only because of the lack of an

instruction which defendant failed to request. The salutary purpose of Rule 51 was to prevent just such an horrendous result, and we refuse to disregard that purpose.

VI.

A

The defendant argues that it was error for the court to admit certain "hearsay" testimony by the plaintiff of what certain newsboys with whom he dealt said to him. One newsboy said, according to the plaintiff, that "WIP radio was really blasting me, they were really knocking me." The plaintiff then testified as to the effect of this statement on him.

This testimony of the plaintiff was not admitted for the truth of its assertion, to wit, that WIP was in fact "blasting" the plaintiff (this was already in evidence through the introduction of the scripts), but to show what effect this statement had on the plaintiff. It constituted a verbal act.

B

The plaintiff testified that 34 of his original 60 customers refused to do business with him, and that "They told me, in fact, 'You are a racketeer. We won't have anything to do with you.' "

The reasons given by the plaintiff's customers for refusal to deal constituted a well-established exception to the hearsay rule: "a declaration of a present existing *motive* or *reason* for action." *Wigmore, Evidence* § 1729 (2), Vol. VI (3d Edition); *De Ronde v. Gaytime Shops, Inc.*, 239 F.2d 735, 739 (C. A. 2 1956), (a defamation case).

In any event, that evidence was offered and admitted solely on the issue of special damages. Since that issue was taken from the jury, the error, if any there was, was not prejudicial to defendant.

C

The defendant charges that it was error for the court to exclude the testimony of Paul Rust, news director of WIP, concerning the verification and investigation practices of other news departments in the Philadelphia community. The defendant is correct in its position that Rust's testimony was relevant. It was, however, incompetent because it was based on hearsay as to what other newsmen and news directors had told Rust.

VII.

Although there was warrant in the record for assessing punitive damages, we believe that $725,000 is excessive in light of the function that punitive damages serve; punishing the defendant for its conduct in regard to the present case and deterring future derelictions. This is not to say that the award was the result of bias or prejudice. The jury may, however, have been unduly impressed by the fact that the worth of the defendant was estimated to be approximately $100,000,000. Since we are convinced that the award punishes the defendant far beyond the needs of this case, it is our duty to order a remittitur or a new trial. *Linn v. United Plant Guard Workers of America*, 383 U. S. 53, 65-66 (1966). This duty of the court has been stated broadly:

> "* * * The court may set aside an award of punitive damages deemed to be excessive, or against the weight of the evidence, or larger in amount than the court thinks it justly ought to be. The trial court has a greater role than the court on appeal but we may note that its function may encompass a duty, and not merely an opportunity, to avoid excessive damages by remittitur or new trial. [citing Linn, supra]. * * *" Afro-American Publish-Co. v. Jaffe, 362 F.2d 649, 662 (C. A. (D. C. 1966).

Cf: *Curtis Publishing Co. v. Butts, supra,* at 160.

The practice of the Pennsylvania courts in reducing punitive damage awards deemed excessive has been flexible. In *Purcell* the court reduced a punitive damage award "with justice to all parties concerned.," 411 Pa. at 188, in spite of the fact that it stated: "The learned court below, in an able opinion, reasoned the justification of this award and we cannot say that it was not warranted in its rationalization." *Ibid.*, at 187.

Our conclusion that the punitive damages awarded are excessive is not based upon the fact that the plaintiff, entitled only to $25,000 compensatory damages, would receive a hugh windfall. The theory of punitive damages does not take into consideration the degree to which the plaintiff will benefit from the award. Rather, we look to the seriousness of the defendant's conduct and the degree to which it will be punished and deterred by this award. Our reaction is admittedly visceral. We conclude that punitive damages in the sum of $250,000 will adequately and justly both punish the defendant and deter it from future reckless conduct.

We have considered the other grounds urged by defendant and find them without merit.

ORDER

AND NOW, this 28th day of August 1968, IT IS ORDERED:

(1) Defendant's motion for judgment n.o.v. is DENIED.

(2) Defendant's motion for a new trial is GRANTED, limited to the amount of punitive damages, unless plaintiff shall, within twenty (20) days of the date hereof, file a remittitur of all punitive damages in excess of Two Hundred and Fifty Thousand Dollars ($250,000), in which event defendant's motion is DENIED.

BY THE COURT
JOSEPH N. LORD, III
J.

REMITTITUR

Now Comes George Rosenbloom, plaintiff, and his attorney, Benjamin Paul, Esquire, in the above entitled cause, and show the Court that on August 28, 1968, the following Judgment was entered in said cause:

Defendant's Motion for Judgment N.O.V., is denied and Defendant's Motion for a New Trial limiting amount of punitive damages is granted unless Plaintiff shall, within 20 days of the date, file a Remittitur of all punitive damages in excess of $250,000.00, in which event the Defendant's Motion is denied.

S/ JUDGE JOSEPH S. LORD, III

And said Plaintiff and said attorney further show that they desire to make remittitur of all punitive damages in excess of $250,000.00 of such Judgment.

Wherefore, the Plaintiff does hereby release unto Metromedia, Inc., the Defendant, all punitive damages in excess of $250,000.00 of such Judgment and does direct that execution hereafter to be issued shall be for the balance only of such Judgment after deducting the amount hereby remitted and in the sum of $250,000.00 punitive damages, $25,000.00 compensatory damages, together with interest and costs.

GEORGE ROSENBLOOM
George Rosenbloom
Plaintiff
BENJAMIN PAUL
Benjamin Paul
Attorney for Plaintiff

Witness the hand and seal of office of the Clerk of the United States District Court for the Eastern District of Pennsylvania, this 3rd day of Sept., 1968.

ROBERT MUSTERING
Deputy Clerk of the United States District Court for the Eastern District of Pennsylvania

NOTICE OF APPEAL

Notice is hereby given that Metromedia, Inc., the above named defendant, hereby appeals to the United States Court of Appeals for the Third Circuit from the final judgment entered in this action on August 28, 1968.

BERNARD G. SEGAL
BERNARD G. SEGAL
Attorney for Defendant

SCHNADER, HARRISON, SEGAL
& LEWIS,
1719 Packard Building,
Philadelphia, Pa. 19102.
Of Counsel.

Opinion of the United States Court of Appeals

for the Third Circuit

(Filed September 15, 1969)

SEITZ, *Circuit Judge*.

George Rosenbloom (plaintiff) brought an action for libel in the district court based on diversity of citizenship against Metromedia, Inc. (defendant), alleging that certain radio broadcasts in October of 1963 by WIP, a radio station in Philadelphia managed and controlled by defendant, injured his reputation. The case was tried to a jury, and, after defendant's motions for a directed verdict and for binding instructions were denied, a verdict was returned in favor of the plaintiff for $25,000 in compensatory damages and $750,000 in punitive damages. The district judge reduced the punitive award to $250,000 on remittitur, which was accepted by plaintiff, but denied defendant's alternative motions for judgment n. o. v. or a new trial. 289 F. Supp. 737 (E. D. Pa. 1968). Defendant appeals.

In the spring of 1963, plaintiff became a distributor in and around the Philadelphia, Pennsylvania area of nudist magazines published by Outdoor American Company. In fall of 1963, acting upon complaints concerning obscene magazine and book sales in the city, Captain Clarence Ferguson of the Philadelphia Police Department's Special Investigations Squad carried out first an investigation and then, after October 1, 1963, a series of arrests in connection with the investigation. A raid was made on plaintiff's home and warehouse, his magazines were confiscated, and he was arrested.

The first series of allegedly defamatory radio broadcasts dealing with the raids were made on October 4 and

5 as part of the regular newscasts on the hour and half hour. The first such broadcast was that of October 4, 1963, at 6:00 p.m.:

> "City Cracks Down on Smut Merchants
>
> "The Special Investigations Squad raided the home of George Rosenbloom in the 1800 block of Vesta Street this afternoon. Police confiscated 1000 allegedly obscene books at Rosenbloom's home and arrested him on charges of possession of obscene literature. The Special Investigations Squad also raided a barn in the 20 Hundred block of Welsh Road near Bustleton Avenue and confiscated 3000 obscene books. Captain Ferguson says he believes they have hit the supply of a main distributor of obscene material in Philadelphia."

This news report was repeated as part of later news broadcasts some seven times with substantially the same text. The variations involved the use of the word "reportedly" for "allegedly", the use of "the Police believe" for "Captain Ferguson says he believes" in the third sentence, the insertion of the word "allegedly" before "obscene books" in the second sentence, and the substitution in the last broadcast of the phrase "smutty periodicals" for the reference to "obscene books." Apparently, the only alleged libel in the first series was in the failure to use the word "allegedly" in certain places in the quoted broadcast.

The second series of allegedly defamatory broadcasts occurred on October 21, 25 and November 1, again as part of the regular news broadcasts on the hour and half hour. They consisted of reports of a law suit brought by plaintiff and two publishers to enjoin the allegedly illegal arrests and defamatory statements. The first of this series was broadcast October 21 at 8:30 a.m.:

> "Federal District Judge Joseph S. Lord, Third, will hear arguments today from two publishers and

a distributor . . . all seeking an injunction against Philadelphia Police Commissioner Howard Leary . . . District Attorney James C. Crumlish, Jr. . . . a local television station and a newspaper . . . ordering them to lay off the smut literature racket.

"The girlie-book peddlers say the police crackdown and continued reference to their borderline literature as smut or filth is hurting their business. Judge Lord refused to issue a temporary injunction when he was first approached. Today he'll decide the issue. It will set a precedent . . . and if the injunction is not granted . . . it could signal an even more intense effort to rid the city of pornography."

Succeeding reports were in a similar vein. All made reference to "smut" and/or "girlie-books" and implied that the distributor and the two publishers wanted to stop all obscenity raids throughout the city, even as against literature that was in fact pornographic and even though plaintiffs had nothing to do with its distribution. The implication was not justified since plaintiffs had only sought to prevent alleged police harassment of them alone and asserted that their publications were not obscene. In one such broadcast "allegedly" was omitted before "smut distributors". At no time did the broadcasts mention the names of the distributor and publishers involved in the lawsuit. Although defendant contends to the contrary, we shall accept the district court's conclusion that certain of the statements in the two series were defamatory as a matter of Pennsylvania law and, in the circumstances, created a jury issue under such law.

Defendant's principal contentions on appeal are that the district court erred in refusing to hold that the action was controlled by the federal controlled by the federal constitutional standard of "actual malice" as defined in Times v. Sullivan[1] and that when so tested the evidence was insufficient to submit the case to the jury.

[1] 376 U. S. 254 (1964).

I.

Freedom of speech and of the press are of course secured by the First Amendment. Practical implementation of those important principles is found in several recent Supreme Court pronouncements, although admittedly none are factually controlling here. Those cases teach that the First Amendment guarantees must be applied broadly lest they suffocate for lack of breathing room. They demonstrate that some degree of abuse is inescapable if the press is to discharge its function adequately; that such abuse must be tolerated or the guarantee will be unduly chilled by the threat of defamation actions, with resultant damage to the general public which is the primary beneficiary of the guarantee.

But actions for defamation of character have long been recognized as serving an important function in protecting the rights of citizens. "The rule that permits satisfaction of the deep-seated need for vindication of honor is not a mere historic relic, but promotes the law's civilizing function of providing an acceptable substitute for violence in the settlement of disputes." Afro-American Publishing Co. v. Jaffe, 366 F.2d 649, 660 (C. A. D. C. 1966). The problem is to find a standard reflecting an accommodation between the competing values in the context of each factual setting. We address ourselves to that task.

II.

Preliminarily, we note that the fact that the news medium here is a radio station rather than a newspaper does not make the First Amendment discussion, in particular with regard to freedom of the press, any less germane. Radio and television were of course, unknown media when freedom of the press was written into the Bill of Rights, but no rational distinction can be made between radio and television on the one hand and the press

on the other in affording the constitutional protection contemplated by the First Amendment. Rumely v. United States, 197 F.2d 166 (C. A. D. C. 1952), aff'd., 345 U. S. 41 (1953).

In our case the subject matter of the first set of broadcasts alleged by plaintiff to be defamatory is a series of police raids on alleged distributors and sellers of obscene matter. Such raids were made by the police only after public complaints about the widespread dissemination of obscene literature in the center city area of Philadelphia had provoked a major police investigation. We have no doubt that these raids were matters of public interest.

The second series of broadcasts dealt with the institution and development in a legal action by plaintiff and two publishers against an influential segment of the news media (all major local newspapers and the local CBS-TV affiliate), as well as against the City of Philadelphia, its Police Commissioner, and its district attorney to end harassment of plaintiffs in the operation of their businesses. Again, it is clear to us that the subject matter was of real public interest. Indeed, the Supreme Court has construed broadly the concept of a matter of an issue of public interest:

> "The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. 'Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable

the members of society to cope with the exigencies of their period.' Thornhill v. Alabama, 310 U.S. 88, 102." Time, Inc. v. Hill, 385 U. S. 374, 388 (1967).

Not only did the broadcasts under attack concern subject matter of public interest, but of equal significance they involved broadcasts of "hot news" items, i.e., summaries of the latest news given on the hour and the half hour in reports ranging from ninety seconds to ten minutes. In one of the ten minute broadcasts containing alleged defamatory matter there were eighteen separate items of news covered. The primary value of these items to the public is in conveying the latest news as promptly as possible so that it has the opportunity to be informed of news items of possible immediate public concern. It is not realistic to require thorough research or verification of each individual item under these conditions. The need for constitutional protection in the circumstances is much more apparent than in the cases of the so-called documentaries or feature stories where time is available to attempt to verify questionable material.

In its discussion of malice in connection with its consideration of the state law issue of punitive damages, the district court stated that "This is not then a case where a newsworthy incident occurs spontaneously and a news purveyor must rely on eyewitness accounts subject to the vicissitudes of human perception." Viewing these broadcasts from a First Amendment perspective, we think this was an unduly narrow evaluation of the function of the newscasts. The district court's approach in effect imposes a duty on the broadcaster to be "right" except in the most limited circumstances and therein lies its vice when judged by First Amendment standards.

III.

The district court concluded that the First Amendment was inapplicable because plaintiff was not a public figure within the meaning of that term as employed in

Curtis v. Butts, 388 U. S. 130 (1967). Contrary to the view of the district court, we do not consider the absence of a public figure of controlling importance here. Considering the type of news broadcasts involved as well as the established public interest in the subject matter, we conclude that the fact that plaintiff was not a public figure cannot be accorded decisive importance if the recognized important guarantees of the First Amendment are to be adequately implemented. In Time, Inc. v. Hill, supra, the Court applied the Times rule to false reporting of "matters of public interest" in connection with an action for invasion of the right to privacy by a private individual. See also Linn v. United Plant Guard Workers, 383 U. S. 53 (1966), and Pickering v. Board of Education, 391 U. S. 563 (1968). Our conclusion finds support in similar rulings of other courts. United Medical Laboratories v. Columbia Broadcasting System, 404 F.2d 706 (9th Cir. 1968), cert. den., 394 U. S. 921 (1969); Bon Air Hotel, Inc. v. Time, Inc., 295 F. Supp. 704 (S. D. Ga. 1969); All Diet Foods Distributors, Inc. v. Time, Inc., 290 N. Y. S. 2d 445 (Sup. Ct. 1967). See also Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir. 1969), cert. den., 395 U. S. 922 (1969).

It is our view that at least in the present factual context the proper accommodation between the First Amendment protections and the state law of defamation is found by requiring a plaintiff to meet the standard of proof formulated in New York Times Co. v. Sullivan, supra, i.e., that in order to recover damages here, plaintiff must prove that the statement was made with "actual malice"—either with knowledge that it was false or with reckless disregard of whether it was false or not. In adopting the accommodation reflected in the actual malice standard we are not precluding plaintiff and others in similar situations from recovering in actions for defamation of character. We are merely establishing the quantum and type of proof required to permit recovery. When the proof rises to the requisite level and quality:

"the constitutional guarantees can tolerate sanctions against *calculated* falsehood without significant impairment of their essential function." Time, Inc. v. Hill, supra, at 389.

IV.

It remains to be determined whether the evidence met the federal actual malice standard so as to be a proper case for the jury.[2] This we must do "to make certain that those [constitutional] principles have been constitutionally applied." Times v. Sullivan, supra at p. 285. Preliminarily, we note that the district court found "that no one at WIP harbored any personal animus toward the plaintiff, George Rosenbloom." But the district court found strong evidence of malice under Pennsylvania law from the four pieces of evidence. We realize that, strictly speaking, the district court did not evaluate the evidence by federal standards, but we, of course, must do so. We will now evaluate seriatim under the controlling federal standard the evidence which the district court isolated on the issue of malice.

Plaintiff made one attempt to contact the radio station. On October 26 or 27, he went to the studios of WIP in order to inquire about the substance of the broadcasts about his activities. He talked on an inter-office phone with a part-time news broadcaster of the station who, upon plaintiff's request, read to him the text of the noon broadcast of October 21. Plaintiff then told the newscaster that his periodicals were found not to be obscene by the United States Supreme Court. The newscaster answered that the district attorney had said that the magazines in question were obscene. Plaintiff disputed this saying he had in his possession a statement by the district attorney saying that plaintiff's magazines were legal. The broad-

[2] We put aside the issue as to whether the jury instructions could be construed to have complied with the Times standard.

caster then apparently hung up on him. This ended plaintiff's contact with the radio station.

The district court equated this incident with a refusal to broadcast a retraction[3] or worse. We think the evidence of the incident lacked both sufficient substance and clarity to meet the standard required to show actual malice. It amounted to little more than an argument and a difference of opinion between plaintiff and one of defendant's employees at a time when all except one of the challenged broadcasts had already taken place. Its value in considering the earlier broadcasts is dubious at best. Only one broadcast took place after this conversation. It is attacked on the ground that it contains an inaccurate statement concerning plaintiff's injunction action in that it stated that the district attorney considered plaintiff's publications to be smut and immoral literature. The transcript of the testimony shows that plaintiff's own attorney, when questioning defendant's representative concerning the allegedly defamatory portion of the last broadcast, said that he was not questioning its "accuracy". Furthermore, his examination of the same witness brought out that defendant's representative confirmed the story with the judge involved before the broadcast was made. We think that the episode described failed to provide evidence of actual malice with the requisite convincing clarity to create a jury issue under federal standards.

The district court next points to the failure of defendant's representative to confront plaintiff personally about the matter and its failure to look at the magazines to determine whether they were obscene as evidence of "a reckless disregard for a person in no position to make himself heard." We think the burden the district court would place on defendant is not constitutionally permissible under the Supreme Court cases. Defendant was reporting fresh news developments consisting of activities and

[3] In the Times case the Supreme Court queried, "Whether or not a failure to retract may ever constitute such evidence" [of malice when judged by constitutional standards] at p. 286.

charges made by public authorities and counter activities by the plaintiff in an area of public concern. Considering the subject matter and defendant's function, the First Amendment insulated it from the duty which the district court would impose on it as a matter of Pennsylvania law. Moreover, this record does not show that defendant was on notice of any challenge to the accuracy of its reporting until after the next to the last broadcast. We have already noted that the accuracy of the last broadcast was first checked with the judge involved and its accuracy also apparently conceded at the trial. If, as might also seem to be the case, the district court evaluated such evidence on the basis of the standard of proof suggested in Justice Harlan's minority opinion in the Butts case,[4] our answer must be that we think the controlling rule should be the same as the Times rule which was applied by a majority of the Justices in the Butts case.

Finally, the district court concluded that the highly inflammatory references (girlie-book peddlers and smut distributors) in the second series of broadcasts constituted evidence of a reckless disregard of plaintiff's rights. But, as the Supreme Court said in Garrison v. Louisiana, 379 U. S. 64, 74 (1964), "only those false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions." It is difficult to see how characterizing them as inflammatory tends to prove the requisite awareness of their probable falsity.

We conclude that the First Amendment standard of actual malice is applicable to the case and that the evidence was constitutionally insufficient to support a judgment for plaintiff. The district court should have granted defendant's motions for a directed verdict and for judgment n.o.v.

---

[4] " * * * a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." Butts, supra, at p. 155.

The judgment of the district court will be reversed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

ORDER

It Is Ordered that the following footnote 5 be inserted after the letters "n. o. v." on page 11 of the slip opinion:

"5. Plaintiff does not on appeal challenge our right to review on its merits the district court's denial of defendant's motion for judgment n.o.v. In any event, we think there was substantial compliance with F. R. Civ. P. 50(b)."

By THE COURT,
Collins J. Seitz,
Circuit Judge.

Date: October 6, 1969.

Supreme Court of the United States

No. 947 ----- , *October Term, 19* 69

George A. Rosenbloom,

Petitioner,

v.

Metromedia, Inc.

ORDER ALLOWING CERTIORARI. Filed February 24 -------- , 19 70.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third ----------. Circuit is granted, and the case is placed on the summary calender.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office Supreme Court, U.S.
FILED
DEC 12 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969

No. ~~69-[illegible]~~ 66

GEORGE A. ROSENBLOOM, *Petitioner*

v.

METROMEDIA, INC., *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BENJAMIN PAUL
Attorney for Petitioner
Suite 402
Liberty Trust Building
Broad and Arch Streets
Philadelphia, Pa. 19107

WILLIAM D. IVERSON,
Of Counsel

LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107

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St. Amant v. Thompson, 390 U.S. 727 (1968) 9, 14, 16

Time, Inc. v. Hill, 385 U.S. 374 (1967) 12, 13

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Privacy, Defamation, and the First Amendment: The Implications of Time, Inc. v. Hill, 67 Colum. L. Rev. 926 (1967) 9

The New York Times Case: A Note on "The Central Meaning of the First Amendment," 1965 Sup. Ct. Rev. 191 (1964), by Kalven 9

The Reasonable Man and the First Amendment: Hill, Butts, and Walker, 1967 Sup. Ct. Rev. 267 (1967), by Kalven 9

The Scope of First Amendment Protection for Good-Faith Defamatory Error, 75 Yale L. J. 642 (1966) 9

IN THE

Supreme Court of the United States

October Term, 1969

No.

GEORGE A. ROSENBLOOM, *Petitioner*

v.

METROMEDIA, INC., *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in *George A. Rosenbloom v. Metromedia, Inc.*, entered September 15, 1969. That judgment reversed a judgment of the United States District Court for the Eastern District of Pennsylvania and remanded this case to the District Court for the entry of a judgment in favor of the respondent.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported. It is printed as Appendix A hereto. The opinion of the District Court for the Eastern District of Pennsylvania, which is dated August 28, 1968, is reported at 289 F. Supp. 737 (E.D. Pa. 1968). It is printed as Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on September 15, 1969, and is printed as Appendix C hereto. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Should the rule established in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), be broadened to prohibit a private citizen who is neither a public official nor a public figure from recovering damages for a defamatory falsehood relating to his involvement in a matter of public interest unless he proves that the statement was made with "actual malice"?

2. If a private citizen who is neither a public official nor a public figure must prove, in order to recover damages, that a defamatory statement was made with "actual malice," was the evidence in this case sufficient to support this finding by the jury?

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

A jury awarded damages for libel in this case to the petitioner, Mr. Rosenbloom, a small independent distributor of magazines promoted by legitimate nudist groups, who was wrongfully accused by Metromedia's Philadelphia radio station of being a "smut distributor" and "girlie-book peddler," and who was found by an instructed jury not guilty of the charges.

To avoid confusion from unrelated issues, it is important to emphasize what the case does not involve. There is no issue concerning obscenity or "hard core" pornography. The publications distributed, as has been mentioned, were found to be not obscene as a matter of law by the trial judge when Mr. Rosenbloom was tried for the possession of obscene material, and the jury was directed to return a verdict of acquittal. (R. 224a) These findings were in strict accordance with the settled constitutional doctrine of this Court.[1] That phase of events has consequently been resolved, and this case involves only the question whether a jury verdict awarding general and punitive damages for libel should be disturbed.

When this controversy arose in 1963, Mr. Rosenbloom had just launched his business, after spending several years as a paperback book salesman. He had accepted an offer that May to become a distributor for the Outdoor American Publishing Company, after thoroughly investigating the propriety of the company's magazines promoting legitimate nudism. He handled only their publications, eschewing more flamboyant and controversial materials. (R. 97a)

It was a small but growing business. His home was his office and his stock was stored in a barn rented from a neighbor. By October 1, he had built his business from nothing to 60 outlets. (R. 98a) On that day the police were beginning a campaign to rid the city of pornography. Mr. Rosenbloom was arrested as he was making a delivery to a center

[1] *Mounce v. United States*, 355 U.S. 180 (1957); *cf. Roth v. United States*, 354 U.S. 476 (1957), *Manuel Enterprises v. Day*, 370 U.S. 478 (1962).

city newsstand—the arrest was largely fortuitious, since the campaign was directed not at his publications, but at more lurid material. Three days later, the police raided his home and the rented barn he used as a warehouse, seizing large quantities of his magazines at both places. Mr. Rosenbloom, who had been released on bail after his first arrest, surrendered to the police upon hearing of the raids and was rearrested. (R. 131a)

Both the arrests and the raids were held by a court to be wrong, of course.

But long before his eventual exoneration in court, the media in Philadelphia had themselves judged his case. Two series of radio newscasts on Station WIP, which is managed and controlled by the respondent Metromedia, Inc., are involved in this libel case. The first series began with an announcement headlined "City Cracks Down on Smut Merchants," which was broadcast October 4, 1963, on the six o'clock news. The portion of that newscast bearing on Mr. Rosenbloom's arrest reported (1) that the police had raided his home; (2) that the police had confiscated a thousand magazines and arrested Mr. Rosenbloom on charges of possession of obscene literature; (3) that the police had also raided a barn rented by Mr. Rosenbloom and confiscated obscene books there; and (4) that police Captain Ferguson, who led the raids, believed the police had "hit the supply of the main distributor of obscene material in Philadelphia." (R. 26a, 350a)

This newscast was repeated, with minor changes, during the evening of October 4 and again the next day. (R. 353a-360a) The fact that Mr. Rosenbloom was arrested and his magazines seized was reported accurately. In the initial newscasts, however, the station failed to qualify its description of the books seized in the second raid as "allegedly" obscene, and therefore assumed responsibility for their characterization as obscene, a characterization which Mr. Rosenbloom's later acquittal proved erroneous. In addition, of course, the beliefs of the arresting officer reported by

Station WIP that Mr. Rosenbloom was a major distributor of obscene material were in error.

The second group of newscasts were on October 21, October 25 and November 1. These broadcasts varied in language and content. At different times, however, Station WIP referred to Mr. Rosenbloom and the Outdoor American Publishing Company, as "girlie-book" or "smut" peddlers and erroneously stated that they were attempting to force the police and news media "to lay off the smut literature racket." (R. 369a-401a)

PROCEEDINGS BELOW

District Court

Mr. Rosenbloom brought this suit for libel as a diversity action under 28 U.S.C. §1332 in the District Court for the Eastern District of Pennsylvania. The case was tried before a jury in 1968. The trial judge rejected an instruction submitted by the respondent based upon *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and succeeding cases on the ground that Mr. Rosenbloom was not a public figure, and instead instructed the jury according to Pennsylvania law. (R. 442) The jury was told that to return a verdict for general damages, they would need to find (1) that one or more broadcasts were defamatory, (2) that the statement could reasonably be taken to have referred to the plaintiff, (3) that the station had violated its privilege "to report the news . . . so long as it does so fairly and accurately, and so long as that privilege was exercised reasonably and with reasonable care," and (4) that the statement was false. (R. 324a-328a)

In order to return punitive damages, the jury was told that it would need to find malice as that term was defined by Pennsylvania law; *i.e.*, "that these broadcasts were published with a bad motive or with reckless indifference to the rights of others." (R. 333a)

The jury returned a verdict for Mr. Rosenbloom, awarding actual damages of $25,000 and punitive damages of $725,000. The trial judge reduced the total verdict to $250,000 on remittitur, which Mr. Rosenbloom accepted. Metromedia's motions in the alternative for judgment n.o.v. or a new trial were denied in a lengthy opinion by the trial judge which held that the evidence was sufficient to justify an award of punitive damages under Pennsylvania law, and that Mr. Rosenbloom should not be required to show actual malice in the constitutional sense since he was not a public figure. (R. 435a-456a, App. B)

Court of Appeals

The Court of Appeals refused to attach controlling weight to the absence of a public figure. In view of "the established public interest in the subject matter" of the broadcasts the court concluded that "proper accommodation between the First Amendment protections and the state law of defamation is found by requiring a plaintiff to meet the standard of proof formulated in *New York Times Co. v. Sullivan*. . . ."

The court next scrutinized the record to determine "whether the evidence met the federal actual malice standard so as to be a proper case for the jury." The petitioner had introduced uncontradicted evidence that when he had visited the station during the second series of broadcasts and before their conclusion, a receptionist had directed him to speak with a station representative on an interoffice telephone. The representative, a part-time news announcer, hung up when Mr. Rosenbloom challenged the accuracy of the newcasts. (R. 135a-138a) Although the jury was obviously influenced by this factor in awarding punitive damages,[2] the Court of Appeals concluded that neither this evidence nor evidence of the station's failure to investigate the matter or even to look

[2] The trial judge gave prominent attention to this fact, together with the facts mentioned in the text, in upholding the jury verdict for punitive damages. (R. 449a, App. B).

at his magazines before terming them "obscene," nor the "highly inflammatory references" to "girlie-book peddlers" and "smut distributors" in the second series of newscasts provided "evidence of actual malice with a requisite convincing clarity to create a jury issue under federal standards."

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals, in Applying the Rule of New York Times Co. v. Sullivan to a Suit for Libel by a Strictly Private Citizen Involuntarily Involved in a Matter of Public Interest, Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by this Court.

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 279 (1964), this court held that "the principle that debate on public issues should be uninhibited, robust and wide open" required "a federal rule that protects a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'. . . ." The petitioner in no way seeks to impair the full sweep of *New York Times* or the subsequent cases in which the Court has carefully explored the radiations of that decision.

One consequence of this appropriate case-by-case development of doctrine, however, is uncertainty on the part of lower courts concerning the ultimate reach of *New York Times* to strictly private citizens. A majority of the Court joined Part I of Chief Justice Warren's opinion in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 162 (1967), which applied the requirement of actual malice to suits for defamation by public figures—that is, persons

> "who do not hold public office at the moment [but] are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." *Id.* at 164.

Other decisions have studied the questions of who is a public official and what the evidentiary requirements for a showing of actual malice must be. *E.g.*, *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967); *Rosenblatt v. Baer*, 383 U.S. 75 (1966); *Garrison v. Louisiana*, 379 U.S. 64 (1964). But this Court has not since its decision in *Butts* had occasion to consider the need for, or reasons against, an extension of *New York Times*. Several commentators have suggested, at the time of the original decision and in the wake of later cases, that there is no logical, workable stopping point for the *New York Times* rule short of the entire law of libel. *See, e.g.*, Kalven, *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 SUP. CT. REV. 267 (1967); Comment, *Privacy, Defamation, and the First Amendment: The Implications of Time, Inc., v. Hill*, 67 COLUM. L. REV. 926 (1967); Comment, *The Scope of First Amendment Protection for Good-Faith Defamatory Error*, 75 YALE L. J. 642 (1966); Kalven *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191 (1964).

The Court of Appeals decision here seemingly embraces that approach in defining the sweep of *New York Times* to include, essentially, all reports dealing with matter of "public interest," regardless of the public or private character of the person libeled. This Court has not yet so decided, however, and in the interest of settling the question and for the guidance of both federal and state courts, we respectfully suggest that the question deserves the attention of this Court.

Mr. Rosenbloom was a private citizen before his arrest, unknown to the public and of no interest to it. His arrest was perhaps of interest to the public, but even that interest arguably was kindled chiefly by the misrepresentations of the media. Station WIP apparently concluded that the public had no interest in his side of the story in re-

buffing his efforts to protest the later broadcasts and correct the record.

Mr. Rosenbloom was, however, grievously injured by the onslaughts of the media. Although the trial court denied special damages because his losses could not be directly traced to the WIP newscasts, rather than other media accounts and mis-accounts of his arrest, it is undisputed that he lost roughly half his outlets within a month of his arrest and eventually went out of business. (R. 331, [illegible])

Mr. Rosenbloom's hurt was important to him, of course, but of general significance is the threat to other citizens' reputations if the Court of Appeals decision is to be the law. Many private men are arrested for reasons that subsequently prove erroneous. Their prosecution gravely inconveniences them, even if they are acquitted. But news reports of their difficulties, often inflated, sometimes sensationalized, may do much more disastrous damage to their families, their reputations, their businesses, their friendships.

Consider the case of a man whom a magazine may accuse of Mafia connections, perhaps on no stronger basis than an Italian name and an affection for Italian restaurants also patronized by actual Mafia members. The public has, or can be persuaded by the media to have, an interest in such speculations. A public official, as *New York Times* observed, generally has access to the media to rebut such innuendoes. But as Mr. Rosenbloom's experience shows, a private citizen generally does not. If such a person cannot resort to a court to protect his reputation, the result is harsh. The same is true of a man pointed out in the press, on the basis of anonymous tips or "investigative reporting," as being a slumlord, a playboy, a gambler, a war profiteer, a loan shark, a purveyor of adulterated foods, a racist, a Communist, a child molester, a dupe for sinister forces, or any number of other things.

The questions presented by this case, and by the hypothetical cases suggested, are difficult. Robust public debate inevitably threatens private reputations, but, just as inevitably, any judicial attempt to protect reputations threatens the public's interest in debate. The petitioner agrees that the decision in *New York Times* is the appropriate reference point "in all libel actions arising from a publication concerning public issues." *Butts*, 388 U.S. at 147 (opinion of Harlan, J.). But this reference point does not imply that the requirement of actual malice announced in that case should become the constitutional rule in all cases. The differences between this case and earlier cases examined by the Court suggest the need for a careful appraisal of First Amendment needs in this new context.

Since the target of the defamatory utterances here was not a government official, there is no danger that a verdict for the petitioner would border dangerously close upon punishing the respondent for seditious libel against the state. *Cf. New York Times*, 376 U.S. at 277-78. And since he was also not even a public figure, there is markedly less reason to fear, in cases such as this, that the complexity of modern life has so blurred the lines between governmental and non-governmental functions and institutions as to make any distinction unworkable. *Butts*, 388 U.S. at 163 (opinion of Warren, C. J.).

Moreover, Mr. Rosenbloom as a private citizen involuntarily exposed to public attention has not assumed the risk of vigorous, even inaccurate criticism, by accepting public office or thrusting himself into the "vortex" of a public controversy, *Cf. id.* at 155 (opinion of Harlan, J.): *Rosenblatt v. Baer*, 383 U.S. 75, 86 n. 12 (1967); *New York Times*, 376 U.S. at 273.[3] Nor could he hope that the media would publish or the public notice any rebuttals

[3] It could hardly be argued that a private citizen such as Mr. Rosenbloom has thrust himself into a public controversy by distributing magazines already found innocuous by this Court, see note 1 *supra*; the case might be quite different were more controversial material involved.

he might voice. He did not, as already mentioned, have the platform of public office from which to speak, or the privilege enjoyed by an official, *cf. id.* at 283; *Barr v. Mateo*, 360 U.S. 564 (1960). And the public had no "independent" interest in him that would assure its attention to his version of events. *Cf. Butts*, 388 U.S. at 154 (opinion of Harlan, J.), 164 (opinion of Warren, C. J.)

In short, neither the peculiar importance of utterances against the government emphasized in *New York Times* nor the plaintiff's "prior activities and means of self-defense" relied upon in *Butts* demonstrate a special need to protect First Amendment values in this case or justify a narrowly limited measure of judicial protection for Mr. Rosenbloom's reputation. Accordingly, there is a serious question whether the stern rule announced in those cases should be applied here.

Since all must share concern for First Amendment values, it should be pointed out that there are alternative standards to insure breathing space for those values in cases such as this. This Court, upon consideration, might conclude that the qualified privilege the law of Pennsylvania accords the media to report the news so long as they exercise reasonable care, allows them sufficient leeway in cases involving private persons such as Mr. Rosenbloom. *See Purcell v. Westinghouse Broadcasting Co.*, 411 Pa. 167, 191 A.2d 662 (1963). The Court may well decide upon some other standard but the importance of the question to many private citizens[1] and the nature of the discussion in the lower courts show the need for review by this Court. *See Time, Inc. v. McLaney*, 406 F.2d 565 (5th Cir. 1969); *United Medical Laboratories v. Columbia Broadcasting System*, 404 F.2d 706 (9th Cir. 1968).

Time, Inc. v. Hill, 385 U.S. 374 (1967) does not foreclose the question. This Court there held that a private citi-

[1] It would be superfluous for the petitioner to accumulate statistics showing the substantial number of libel cases involving private persons currently in progress and presenting the same question.

zen of no public fame must show actual malice to recover damages in a suit for invasion of privacy. But the Court carefully, and repeatedly, noted that defamation was not involved there, and that different considerations would be presented if it were. *Id.* at 384 n.9, 390-91. And indeed the important differences between a suit for invasion of privacy and a suit for defamation demonstrate that a First Amendment standard appropriate for the former is not necessarily appropriate for the latter.

A suit for invasion of privacy protects the "right to be let alone." A libel suit, on the other hand, roots in damage to the plaintiff's reputation. To the extent the former protects an interest not included in the latter, the values it guards are subjective in the extreme. The monetary equivalent of a tarnished reputation may be difficult to calculate, but the hurt itself is clear enough. The test commonly employed for defamation—that the statement tends to lower the subject in the eyes of the community—shows that the insult required is one appreciated and understood as such by the rest of the community.

Where one can justly ask "to be let alone," however, is anything but a matter of community consensus, except in the most intimate areas of life. *See Griswold v. Connecticut*, 381 U.S. 479 (1965). There *is* an important interest in being "let alone," but its peculiarly personal, nonmonetary quality makes effective judicial protection difficult when First Amendment values are involved.

This Court stressed that "mental distress" rather than "damage to reputation" was at stake in *Hill*. 385 U.S. at 385 n. 9. And in explaining why Mr. Hill should be accorded less judicial protection in order that the First Amendment might be accorded more, the majority recognized the difficulty of compensating citizens for distress from mere publicity:

> Exposure of the self of others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a soci-

> ety which places a primary value on freedom of speech and of press.

Id. at 388.

Exposure of one's reputation to damaging, defamatory calumny should not be "a concomitant of life in a civilized community," however. The injury is clearer, less justifiable and more susceptible to judicial redress. The public may, in good taste or not, have a legitimate interest in, for example, the experiences of the Hill family, even if publicity embarrasses those affected. The public does not, however, have a legitimate interest in false information and defamatory comments concerning a private citizen.

B. The Determination by the Court of Appeals that the Evidence in this Case Was Constitutionally Insufficient to Support a Finding of Actual Malice Presents an Important Question that this Court Should Decide if the Court Concludes the Standard of Actual Malice Should Apply to this Case.

The petitioner has argued that the rule of *New York Times* should not be extended to this case. If this Court disagrees, however, the petitioner alternatively believes that the evidence was sufficient to support a finding of actual malice.

To demonstrate actual malice, a plaintiff must show that the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at 279-80. As this Court has emphasized, the burden of proof to show such reckless disregard of the truth with the requisite "convincing clarity" is heavy:

> There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)

This Court has held in earlier cases, that neither a failure to investigate beforehand nor a refusal to print a retraction after the fact meets this burden. *See id.* at 733 (investigation); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 84 (1967) (investigation); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 153 (1967) (opinion of Harlan, J.) (investigation); *New York Times Co. v. Sullivan*. 376 U.S. 254, 286 (1964) (retraction).

The Courts of Appeals, in attempting to apply these decisions, considered "seriatim" and rejected as individually insufficient each discrete item of evidence. But the important point is that evidence is additive. And it is our view that the failure of the Court of Appeals to consider the evidence in this fashion caused it to depart from the decisions of this Court in overturning the jury verdict. Station WIP not only failed to investigate; it also rudely rebuffed Mr. Rosenbloom when he asked the station to correct the newscasts. The second series of broadcasts was also, as the district judge emphasized, inflammatory in its references to "girlie-book" and "smut" peddlers and its repeated innuendoes that Mr. Rosenbloom was attempting to force authorities "to lay off the smut literature racket."

Although the trial judge refused to charge the jury in the language of *New York Times*, the jury to all practical effect made a finding of actual malice in awarding punitive damages. The trial court instructed the jury that it could award punitive damages if it found "a bad motive or malice toward the plaintiff, or if you find that it was published with reckless indifference to the truth." (R. 333a) The cavalier disregard for the truth demonstrated by station WIP, when considered in conjunction with its disdain for Mr. Rosenbloom when he attempted to bring the truth before it, provides ample evidence to support a verdict under these instructions.

Here, as in *Butts*, the counsel for the plaintiff did not seriously contend that the defendant was motivated by preexisting animosity toward the plaintiff. *Cf. Butts*, 388 U.S. at 156 n. 20. Station WIP was accordingly not prejudiced by

reference to "a bad motive" in the instructions. The remainder of the instructions were strikingly similar to the instructions in *Butts* which the Court concluded provided adequate assurance that the jury had found a reckless disregard for the truth as required by *New York Times*.[5]

As this Court pointed out in *St. Amant v. Thompson*, 399 U.S. 727, 730 (1968), " 'Reckless disregard' . . . cannot be fully encompassed in one infalliable definition. Inevitably its outer limits will be marked out through case-by-case adjudication. . . ." If the Court concludes that the rule of *New York Times* should be extended to this case, it should utilize this occasion to set further guidelines concerning the evidentiary requirements to support a finding of "reckless disregard."

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

BENJAMIN PAUL
Attorney for Petitioner

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[5] This case, unlike *Butts*, was tried after the decision in *New York Times*. But since the application of a requirement of actual malice here would represent an extension of that decision, and of *Butts*, we do not feel that under these circumstances the petitioner should be forced to face the delay and expense of a new trial.

APPENDIX A

Opinion of the United States Court of Appeals

for the Third Circuit

(Filed September 15, 1969)

SEITZ, *Circuit Judge.*

George Rosenbloom (plaintiff) brought an action for libel in the district court based on diversity of citizenship against Metromedia, Inc. (defendant), alleging that certain radio broadcasts in October of 1963 by WIP, a radio station in Philadelphia managed and controlled by defendant, injured his reputation. The case was tried to a jury, and, after defendant's motions for a directed verdict and for binding instructions were denied, a verdict was returned in favor of the plaintiff for $25,000 in compensatory damages and $750,000 in punitive damages. The district judge reduced the punitive award to $250,000 on remittitur, which was accepted by plaintiff, but denied defendant's alternative motions for judgment n. o. v. or a new trial. 289 F. Supp. 737 (E. D. Pa. 1968). Defendant appeals.

In the spring of 1963, plaintiff became a distributor in and around the Philadelphia, Pennsylvania area of nudist magazines published by Outdoor American Company. In fall of 1963, acting upon complaints concerning obscene magazine and book sales in the city, Captain Clarence Ferguson of the Philadelphia Police Department's Special Investigations Squad carried out first an investigation and then, after October 1, 1963, a series of arrests in connection with the investigation. A raid was made on plaintiff's home and warehouse, his magazines were confiscated, and he was arrested.

The first series of allegedly defamatory radio broadcasts dealing with the raids were made on October 4 and

5 as part of the regular newscasts on the hour and half hour. The first such broadcast was that of October 4, 1963, at 6:00 p.m.:

"City Cracks Down on Smut Merchants

"The Special Investigations Squad raided the home of George Rosenbloom in the 1800 block of Vesta Street this afternoon. Police confiscated 1000 allegedly obscene books at Rosenbloom's home and arrested him on charges of possession of obscene literature. The Special Investigations Squad also raided a barn in the 20 Hundred block of Welsh Road near Bustleton Avenue and confiscated 3000 obscene books. Captain Ferguson says he believes they have hit the supply of a main distributor of obscene material in Philadelphia."

This news report was repeated as part of later news broadcasts some seven times with substantially the same text. The variations involved the use of the word "reportedly" for "allegedly", the use of "the Police believe" for "Captain Ferguson says he believes" in the third sentence, the insertion of the word "allegedly" before "obscene books" in the second sentence, and the substitution in the last broadcast of the phrase "smutty periodicals" for the reference to "obscene books." Apparently, the only alleged libel in the first series was in the failure to use the word "allegedly" in certain places in the quoted broadcast.

The second series of allegedly defamatory broadcasts occurred on October 21, 25 and November 1, again as part of the regular news broadcasts on the hour and half hour. They consisted of reports of a law suit brought by plaintiff and two publishers to enjoin the allegedly illegal arrests and defamatory statements. The first of this series was broadcast October 21 at 8:30 a.m.:

"Federal District Judge Joseph S. Lord, Third, will hear arguments today from two publishers and

a distributor . . . all seeking an injunction against Philadelphia Police Commissioner Howard Leary . . . District Attorney James C. Crumlish, Jr. . . . a local television station and a newspaper . . . ordering them to lay off the smut literature racket.

"The girlie-book peddlers say the police crackdown and continued reference to their borderline literature as smut or filth is hurting their business. Judge Lord refused to issue a temporary injunction when he was first approached. Today he'll decide the issue. It will set a precedent . . . and if the injunction is not granted . . . it could signal an even more intense effort to rid the city of pornography."

Succeeding reports were in a similar vein. All made reference to "smut" and/or "girlie-books" and implied that the distributor and the two publishers wanted to stop all obscenity raids throughout the city, even as against literature that was in fact pornographic and even though plaintiffs had nothing to do with its distribution. The implication was not justified since plaintiffs had only sought to prevent alleged police harassment of them alone and asserted that their publications were not obscene. In one such broadcast "allegedly" was omitted before "smut distributors". At no time did the broadcasts mention the names of the distributor and publishers involved in the lawsuit. Although defendant contends to the contrary, we shall accept the district court's conclusion that certain of the statements in the two series were defamatory as a matter of Pennsylvania law and, in the circumstances, created a jury issue under such law.

Defendant's principal contentions on appeal are that the district court erred in refusing to hold that the action was controlled by the federal controlled by the federal constitutional standard of "actual malice" as defined in Times v. Sullivan[1] and that when so tested the evidence was insufficient to submit the case to the jury.

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[1] 376 U. S. 254 (1964).

I.

Freedom of speech and of the press are of course secured by the First Amendment. Practical implementation of those important principles is found in several recent Supreme Court pronouncements, although admittedly none are factually controlling here. Those cases teach that the First Amendment guarantees must be applied broadly lest they suffocate for lack of breathing room. They demonstrate that some degree of abuse is inescapable if the press is to discharge its function adequately; that such abuse must be tolerated or the guarantee will be unduly chilled by the threat of defamation actions, with resultant damage to the general public which is the primary beneficiary of the guarantee.

But actions for defamation of character have long been recognized as serving an important function in protecting the rights of citizens. "The rule that permits satisfaction of the deep-seated need for vindication of honor is not a mere historic relic, but promotes the law's civilizing function of providing an acceptable substitute for violence in the settlement of disputes." Afro-American Publishing Co. v. Jaffe, 366 F.2d 649, 660 (C. A. D. C. 1966). The problem is to find a standard reflecting an accommodation between the competing values in the context of each factual setting. We address ourselves to that task.

II.

Preliminarily, we note that the fact that the news medium here is a radio station rather than a newspaper does not make the First Amendment discussion, in particular with regard to freedom of the press, any less germane. Radio and television were of course, unknown media when freedom of the press was written into the Bill of Rights, but no rational distinction can be made between radio and television on the one hand and the press

on the other in affording the constitutional protection contemplated by the First Amendment. Rumely v. United States, 197 F.2d 166 (C. A. D. C. 1952), aff'd., 345 U. S. 41 (1953).

In our case the subject matter of the first set of broadcasts alleged by plaintiff to be defamatory is a series of police raids on alleged distributors and sellers of obscene matter. Such raids were made by the police only after public complaints about the widespread dissemination of obscene literature in the center city area of Philadelphia had provoked a major police investigation. We have no doubt that these raids were matters of public interest.

The second series of broadcasts dealt with the institution and development in a legal action by plaintiff and two publishers against an influential segment of the news media (all major local newspapers and the local CBS-TV affiliate), as well as against the City of Philadelphia, its Police Commissioner, and its district attorney to end harassment of plaintiffs in the operation of their businesses. Again, it is clear to us that the subject matter was of real public interest. Indeed, the Supreme Court has construed broadly the concept of a matter of an issue of public interest:

> "The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. 'Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable

the members of society to cope with the exigencies of their period.' Thornhill v. Alabama, 310 U.S. 88, 102." Time, Inc. v. Hill, 385 U. S. 374, 388 (1967).

Not only did the broadcasts under attack concern subject matter of public interest, but of equal significance they involved broadcasts of "hot news" items, i.e., summaries of the latest news given on the hour and the half hour in reports ranging from ninety seconds to ten minutes. In one of the ten minute broadcasts containing alleged defamatory matter there were eighteen separate items of news covered. The primary value of these items to the public is in conveying the latest news as promptly as possible so that it has the opportunity to be informed of news items of possible immediate public concern. It is not realistic to require thorough research or verification of each individual item under these conditions. The need for constitutional protection in the circumstances is much more apparent than in the cases of the so-called documentaries or feature stories where time is available to attempt to verify questionable material.

In its discussion of malice in connection with its consideration of the state law issue of punitive damages, the district court stated that "This is not then a case where a newsworthy incident occurs spontaneously and a news purveyor must rely on eyewitness accounts subject to the vicissitudes of human perception." Viewing these broadcasts from a First Amendment perspective, we think this was an unduly narrow evaluation of the function of the newscasts. The district court's approach in effect imposes a duty on the broadcaster to be "right" except in the most limited circumstances and therein lies its vice when judged by First Amendment standards.

III.

The district court concluded that the First Amendment was inapplicable because plaintiff was not a public figure within the meaning of that term as employed in

Curtis v. Butts, 388 U. S. 130 (1967). Contrary to the view of the district court, we do not consider the absence of a public figure of controlling importance here. Considering the type of news broadcasts involved as well as the established public interest in the subject matter, we conclude that the fact that plaintiff was not a public figure cannot be accorded decisive importance if the recognized important guarantees of the First Amendment are to be adequately implemented. In Time, Inc. v. Hill, supra, the Court applied the Times rule to false reporting of "matters of public interest" in connection with an action for invasion of the right to privacy by a private individual. See also Linn v. United Plant Guard Workers, 383 U. S. 53 (1966), and Pickering v. Board of Education, 391 U. S. 563 (1968). Our conclusion finds support in similar rulings of other courts. United Medical Laboratories v. Columbia Broadcasting System, 404 F.2d 706 (9th Cir. 1968), cert. den., 394 U. S. 921 (1969); Bon Air Hotel, Inc. v. Time, Inc., 295 F. Supp. 704 (S. D. Ga. 1969); All Diet Foods Distributors, Inc. v. Time, Inc., 290 N. Y. S. 2d 445 (Sup. Ct. 1967). See also Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir. 1969), cert. den., 395 U. S. 922 (1969).

It is our view that at least in the present factual context the proper accommodation between the First Amendment protections and the state law of defamation is found by requiring a plaintiff to meet the standard of proof formulated in New York Times Co. v. Sullivan, supra, i.e., that in order to recover damages here, plaintiff must prove that the statement was made with "actual malice"—either with knowledge that it was false or with reckless disregard of whether it was false or not. In adopting the accommodation reflected in the actual malice standard we are not precluding plaintiff and others in similar situations from recovering in actions for defamation of character. We are merely establishing the quantum and type of proof required to permit recovery. When the proof rises to the requisite level and quality:

"the constitutional guarantees can tolerate sanctions against *calculated* falsehood without significant impairment of their essential function." Time, Inc. v. Hill, supra, at 389.

IV.

It remains to be determined whether the evidence met the federal actual malice standard so as to be a proper case for the jury.[2] This we must do "to make certain that those [constitutional] principles have been constitutionally applied." Times v. Sullivan, supra at p. 285. Preliminarily, we note that the district court found "that no one at WIP harbored any personal animus toward the plaintiff, George Rosenbloom." But the district court found strong evidence of malice under Pennsylvania law from the four pieces of evidence. We realize that, strictly speaking, the district court did not evaluate the evidence by federal standards, but we, of course, must do so. We will now evaluate seriatim under the controlling federal standard the evidence which the district court isolated on the issue of malice.

Plaintiff made one attempt to contact the radio station. On October 26 or 27, he went to the studios of WIP in order to inquire about the substance of the broadcasts about his activities. He talked on an inter-office phone with a part-time news broadcaster of the station who, upon plaintiff's request, read to him the text of the noon broadcast of October 21. Plaintiff then told the newscaster that his periodicals were found not to be obscene by the United States Supreme Court. The newscaster answered that the district attorney had said that the magazines in question were obscene. Plaintiff disputed this saying he had in his possession a statement by the district attorney saying that plaintiff's magazines were legal. The broad-

[2] We put aside the issue as to whether the jury instructions could be construed to have complied with the Times standard.

caster then apparently hung up on him. This ended plaintiff's contact with the radio station.

The district court equated this incident with a refusal to broadcast a retraction[3] or worse. We think the evidence of the incident lacked both sufficient substance and clarity to meet the standard required to show actual malice. It amounted to little more than an argument and a difference of opinion between plaintiff and one of defendant's employees at a time when all except one of the challenged broadcasts had already taken place. Its value in considering the earlier broadcasts is dubious at best. Only one broadcast took place after this conversation. It is attacked on the ground that it contains an inaccurate statement concerning plaintiff's injunction action in that it stated that the district attorney considered plaintiff's publications to be smut and immoral literature. The transcript of the testimony shows that plaintiff's own attorney, when questioning defendant's representative concerning the allegedly defamatory portion of the last broadcast, said that he was not questioning its "accuracy". Furthermore, his examination of the same witness brought out that defendant's representative confirmed the story with the judge involved before the broadcast was made. We think that the episode described failed to provide evidence of actual malice with the requisite convincing clarity to create a jury issue under federal standards.

The district court next points to the failure of defendant's representative to confront plaintiff personally about the matter and its failure to look at the magazines to determine whether they were obscene as evidence of "a reckless disregard for a person in no position to make himself heard." We think the burden the district court would place on defendant is not constitutionally permissible under the Supreme Court cases. Defendant was reporting fresh news developments consisting of activities and

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[3] In the Times case the Supreme Court queried, "Whether or not a failure to retract may ever constitute such evidence" [of malice when judged by constitutional standards] at p. 286.

charges made by public authorities and counter activities by the plaintiff in an area of public concern. Considering the subject matter and defendant's function, the First Amendment insulated it from the duty which the district court would impose on it as a matter of Pennsylvania law. Moreover, this record does not show that defendant was on notice of any challenge to the accuracy of its reporting until after the next to the last broadcast. We have already noted that the accuracy of the last broadcast was first checked with the judge involved and its accuracy also apparently conceded at the trial. If, as might also seem to be the case, the district court evaluated such evidence on the basis of the standard of proof suggested in Justice Harlan's minority opinion in the Butts case,[4] our answer must be that we think the controlling rule should be the same as the Times rule which was applied by a majority of the Justices in the Butts case.

Finally, the district court concluded that the highly inflammatory references (girlie-book peddlers and smut distributors) in the second series of broadcasts constituted evidence of a reckless disregard of plaintiff's rights. But, as the Supreme Court said in Garrison v. Louisiana, 379 U. S. 64, 74 (1964), "only those false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions." It is difficult to see how characterizing them as inflammatory tends to prove the requisite awareness of their probable falsity.

We conclude that the First Amendment standard of actual malice is applicable to the case and that the evidence was constitutionally insufficient to support a judgment for plaintiff. The district court should have granted defendant's motions for a directed verdict and for judgment n.o.v.

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[4] " * * * a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." Butts, supra, at p. 155.

The judgment of the district court will be reversed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.

ORDER

It Is Ordered that the following footnote 5 be inserted after the letters "n. o. v." on page 11 of the slip opinion:

"5. Plaintiff does not on appeal challenge our right to review on its merits the district court's denial of defendant's motion for judgment n.o.v. In any event, we think there was substantial compliance with F. R. Civ. P. 50(b)."

By THE COURT,
Collins J. Seitz,
Circuit Judge.

Date: October 6, 1969.

APPENDIX B

Opinion of the United States District Court for the Eastern District of Pennsylvania

JOSEPH S. LORD, III, J.

August 27, 1968

This is an action for libel. The plaintiff, a citizen of Pennsylvania, was at the time of the events which gave rise to the present action a distributor of nudist magazines in a territory including Philadelphia and the surrounding area. The defendant, Metromedia, Inc., a Delaware corporation with its principal place of business in New York, owns and operates a radio station in Philadelphia known as WIP.

The jury rendered a verdict in favor of the plaintiff of general damages in the sum of $25,000 and punitive damages in the sum of $725,000. The defendant has filed motions for judgment notwithstanding the verdict, or, in the alternative, for a new trial.

The asserted liability of the defendant was based upon two series of broadcasts in the fall of 1963. The first series, October 4 and 5, dealt with raids on the plaintiff's home and warehouse and his arrest by the Special Investigations Squad of Philadelphia Police Captain Clarence Ferguson. The first broadcast was that of October 4, 1963 at 6:00 p.m.:

> "City Cracks Down on Smut Merchants
>
> "The Special Investigations Squad raided the home of George Rosenbloom in the 1800 block of Vesta Street this afternoon. Police confiscated 1000 allegedly obscene books at Rosenbloom's home and arrested him on charges of possession of obscene literature. The Special Investigations Squad also raided a barn in the 2000 block of Welsh Road near Bustleton Avenue and confiscated 3000 obscene books. Captain Ferguson

says he believes they have hit the supply of a main distributor of obscene material in Philadelphia."

The substance of this broadcast was repeated seven more times. The only difference of any significance was that in the last six the script added the word "reportedly" or "allegedly" in referring to the books seized in the barn.

The second series, October 21, 25 and November 1, involved the plaintiff's action for an injunction against the allegedly illegal arrests and the publicity thereof. The broadcast of October 21, 1963, at 8:30 a.m. is representative:

> "Federal District Judge Joseph S. Lord, III,[1] will hear argument today from two publishers and a distributor, all seeking an injunction against Philadelphia Police Commissioner Howard Leary, District Attorney James C. Crumlish, Jr., a local television station and a newspaper, ordering them to lay off the smut literature racket.
>
> "The girly-book peddlers say the police crackdown and continued reference to their borderline literature as smut or filth is hurting their business. Judge Lord refused to issue a temporary injunction when he was first approached. Today he'll decide the issue. It will set a precedent and if the injunction is not granted it could signal an even more intense effort to rid the city of pornography."

At 9:30 a.m. on the same day, defendant's broadcast was:

> "Smut distributors seek an injunction against police raids in Philadelphia."

All of the broadcasts in this series were replete with repeated references to "smut" and "girlie books". Furthermore, the plain implication of the broadcasts was that the

[1] The judge in question was in fact the Hon. John W. Lord, Jr.

plaintiffs in the Federal Court were attempting to halt the general campaign against pornographic literature. The unmistakable inference was that plaintiffs wanted to stop all raids throughout the city, even as against literature that was, in fact, pornographic and even though they had nothing to do with its distribution. Thus, at 2:00 p.m. on October 21, defendant described the plaintiffs as:

> "* * * asking an injunction against further raids by police and the District Attorney's office on smut publications. The complainants charge they are being hurt financially. * * *"

Again (October 21 at 4:30 p.m.), the broadcast had complainants going before "Judge Gold"[2]:

> "* * * claiming they are suffering economic and financial hardship because of a recent crackdown on smut material."

The suit(OUTDOOR AMERICAN CORP. et al. v. CITY OF PHILADELPHIA, et al. C. A. No. 34316) was, in fact, only concerned with plaintiffs' publications. It asserted that the publications were not obscene and sought to protect only their own assertedly lawful business.

There is no evidence of what investigation was conducted by defendant other than a reliance on Captain Ferguson for the first series of broadcasts. Captain Ferguson, who had never been to the Philadelphia Art Museum and who was uncertain of its location, conceived of obscenity as:

> "A. Any time the private parts is [sic] showing of the female or the private parts is [sic] shown of males and they are offered for sale to the public, that is what I consider the answer, Mr. Paul."

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[2] A Common Pleas Court judge not involved at all.

I.

NEW YORK TIMES COMPANY v. SULLIVAN, 376 U.S. 254 (1964), laid down the First Amendment rule applicable to libel actions by public officials (376 U.S. at p. 279-280):

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not. * * *"

CURTIS PUBLISHING CO. v. BUTTS, 388 U.S. 130 (1967) considered the impact of *Sullivan* on suits brought by those who are not public officials, but who are "public figures". In that case, Mr. Justice Harlan enunciated a rule formulated somewhat differently from that of *Sullivan*. The Chief Justice, in Part I of his concurring opinion, said (388 U.S. at p. 164):

> "I therefore adhere to the New York Times standard in the case of 'public figures' as well as 'public officials.' * * * "

Four other Justices concurred in Part I of the Chief Justice's opinion. It may therefore be said that the *Sullivan* standard is applicable to cases of "public figures". See CEPEDA v. COWLES MAGAZINE AND BROADCASTING, INC., 392 F. 2d 417 (C. A. 9, 1968), at page 421. The question is does it apply here, a question that is by no means free of difficulty.

In *Butts*, Mr. Justice Harlan said, at page 133:

> "* * * We brought these two cases here * * * to consider the impact of that decision [Sullivan] on libel actions instituted by persons who are not public

> officials, but who are 'public figures' and involved in issues in which the public has a justified and important interest. * * * "

It would thus appear that, having referred to the "figures" and the "issues" in the conjunctive, the Court intended the scope of *Butts* to reach only those cases where both the criteria of a public figure and a public issue were satisfied. And if this is so, we would have no difficulty in concluding that *Butts* does not govern here. George Rosenbloom was not, before defendant's onslaughts, a public figure. Unfortunately, Justice Harlan did not stop with the neat formulation of the reach of *Butts*. Footnote 19 (388 U.S. at p. 155) reads:

> "Nor does anything we have said touch, in any way, libel or other tort actions not involving public figures *or* matters of public interest." (Emphasis added)

Is this later use of the disjunctive to be taken to mean that one not a public figure may nonetheless have to bear the heavy constitutional burden if he is libelled in a matter of "public interest"? We think not.

Application of the constitutional privilege in the law of libel requires a delicate balancing of the freedoms of speech and press on the one hand, and the right of the individual to be free from injury to his reputation by defamation on the other. It cannot be gainsaid that in substituting redress in the courts for violence as a means of vindicating personal rights the law of defamation serves a very useful social function, ROSENBLATT v. BAER, 383 U.S. 75, 86 (1966), a function no less important than that performed by the laws which provide compensatory redress for intentionally or negligently inflicted injury.

In restricting the ambit of recovery in libel actions brought by public officials and "public figures" the Supreme Court has recognized that in light of the values served by the freedoms of speech and the press, certain persons are entitled to more protection than others from injuries to

reputation. Underlying the recent decisions of the Court is the notion that by their activities and their status prominent persons have assumed to some extent the risk of injury due to negligently reported falsehoods and because of their access to the media of mass communication are able to protect themselves from such injuries more adequately than others. In *Butts* Justice Harlan adverted to "the hypothesis that speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies,' Dennis v. United States, 341 U.S. 494 * * *." 388 U.S. at 153. Noting that in personal injury cases the courts have "given much attention to the importance of defendants' activities," the Justice said that "[t]he courts have also, especially in libel cases, investigated the plaintiff's position to determine whether he has a legitimate call upon the court for protection in light of his prior activities and means of self-defense." 388 U.S. at 154. In describing the two respondents in *Butts* and *Walker*, Justice Harlan said (388 U.S. at 154-155):

> "* * * [B]oth Butts and Walker commanded a substantial amount of independent public interest at the time of the publications; both, in our opinion, would have been labeled 'public figures' under ordinary tort rules. * * * Butts may have obtained that status by position alone and Walker by his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy, but *both commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able 'to expose through discussion the falsehood and fallacies' of the defamatory statements.* Whitney v. California, 274 U.S. 357, 377 (Brandeis, J., dissenting)." (Emphasis added)

The Chief Justice, in his concurring opinion, described these "public figures" as individuals who are "intimately involved in the resolution of important public questions or,

by reason of their fame, shape events in areas of concern to society at large." 388 U.S. at 164. "And surely as a class these 'public figures' have as ready access as 'public officials' to mass media of communication, both to influence policy and to counter criticism of their views and activities." *Id.*

We may concede that the suppression of crime is a matter "in which the public has a justified and important interest." BUTTS, *supra*. However, we must also conclude that the libelee's access to means of public rebuttal of public libel is an important, if not essential factor in determining the application *vel non* of the constitutional standard. Speech cannot rebut speech nor propaganda answer propaganda where millions of listeners are available to one side, and the other side finds the telephone hung up when he attempts to protest. Such a brobdingnagian-lilliputian contest is scarcely calculated "to strike a fair balance between the interests of the community in free circulation of information and those of individuals in seeking recompense for harm done by the circulation of defamatory falsehood." BUTTS, *supra*, at p. 153.

The Supreme Court has not yet adopted First Amendment absolutes. *Cf.* Justice Black's concurring opinion in NEW YORK TIMES COMPANY v. SULLIVAN, 376 U. S. at 293. And yet, to insist upon the application of a constitutional standard under circumstances such as these would mean that a person, even though not a public figure, who is accused of crime, however negligently and however falsely, would be denied redress in the courts. We think the philosophy underlying the Supreme Court's opinion precludes such a drastic result.

Rosenbloom was in no sense a public man. Indeed, he was of so little importance that when he approached the defendant seeking a hearing to prove to those in charge that his magazines were neither obscene, nor smut, nor "girlie-books", he was summarily cut off and ignored. Rosenbloom was isolated from public view until

others had thrust him into it, and when the news media finished with him he was in a very real sense defenseless save to the extent that the libel law of Pennsylvania afforded him protection. We conclude, therefore, that because of his public anonymity, which precluded meaningful access to the news media as a means of protecting his reputation, even though he was tangentially involved in a public issue, plaintiff is protected by Pennsylvania libel laws without First Amendment strictures.

II.

We turn, then, to Pennsylvania law.

The defendant argues that the court erred in its charge that the conditional or qualified privilege with which the defendant was clothed as a news medium reporting the news[3] could be abused by a showing of something less than actual malice.

In the first place, it is not at all clear that the privilege obtains in the report of a "judicial proceeding" when no "official action has been taken by the officer or body whose proceedings are thus reported." REST., TORTS, § 611, Comment C. However, assuming *arguendo* that the conditional privilege did attach, we cannot agree that only actual malice will overcome it.

"Want of reasonable care and diligence to ascertain the truth, before giving currency to an untrue communication, will destroy the privilege * * * . O'DONNELL v. PHILADELPHIA RECORD CO., 356 Pa. 307, 315 (1947). See also ALTOONA CLAY PRODUCTS, INC. v. DUN & BRADSTREET, INC., 367 F.2d 625 (C.A. 3, 1966); BAUSEWINE v. NORRISTOWN HERALD, INC., 351 Pa. 634, 645 (1945); MULDERIG v. WILKES-BARRE TIMES, 215 Pa. 470, 474 (1906). And in PURCELL v. WESTINGHOUSE BROADCASTING CO., 411 Pa. 167, 179 (1963), the court said:

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[3] Purcell v. Westinghouse Broadcasting Co., 411 Pa. 167 (1963); Rest., Torts, §611.

"* * * where libel is involved, malice is not necessarily synonymous with malignance of temper, vengefulness of spirit, or personal prejudice, attributes which usually go with 'malice' in non-legal parlance. Legal malice can generate from a reckless and wanton disregard of another's rights. It may arise from a 'want of reasonable care and diligence to ascertain the truth, before giving currency to an untrue communication.' The failure to employ such 'reasonable care and diligence' can destroy a privilege which otherwise would protect the utterer of the communication. (Montgomery v. Dennison, 363 Pa. 225)."

In addition, the defendant was not prejudiced by any putative error of the court in instructing that the jury could find an abuse of the privilege based on conduct less than malicious or reckless since in awarding punitive damages the jury applied the standard now urged on the court and found, and was warranted in finding, malice or recklessness. (See discussion under V, infra). "Although the 'actual malice' instructions were not also given in connection with the compensatory damage issue, it is difficult to conceive how petitioner could have been prejudiced by that failure in view of the fact that the jury, guided by 'actual malice' instructions, awarded $3,000,000 in punitive damages." CURTIS PUBLISHING CO. v. BUTTS, supra, at p. 166.

III.

The defendant moves that judgment be entered in its favor because there was no showing that the defamatory broadcasts caused the plaintiff any injury; because there was no proof that any listener believed the broadcasts to be defamatory; and because there was no proof that any listener believed that the plaintiff was the subject of the second series of broadcasts.

Where a publication is libelous *per se*—that is, defamatory on its face—it is actionable *per se;* one need not prove that he received any injury as a result of the publication in order to recover damages. "In such a case, general damages for loss of personal or business reputation are recoverable and no averments or proof of special damages are necessary." COSGROVE STUDIO AND CAMERA SHOP, INC. v. PANE, 408 Pa. 314, 319 (1962). Compare, e.g., CONTINENTAL NUT COMPANY v. ROBERT L. BERNER COMPANY, 393 F.2d 283 (C. A. 7, 1968) (libel per quod).

Such words as "girly-book peddlers" and "smut peddlers" are defamatory on their face and "need no extrinsic proof of [sic] explanation." 408 Pa. at 319. It is immaterial, then, that the plaintiff introduced no evidence that any listener considered the broadcasts defamatory. "The jury determines whether a communication, capable of a defamatory meaning, was so understood by its recipient." REST., TORTS, § 614(2). See also WEIDER v. HOFFMAN, 238 F. Supp. 437 (M. D. Pa. 1965).

The defendant complains that the plaintiff offered the testimony of not a single witness that the second series of broadcasts, which did not identify the plaintiff by name, were taken to refer to the plaintiff. We left it for the jury to determine whether a reasonable listener, in view of all the circumstances, would have concluded that the broadcasts referred to plaintiff where they did not mention plaintiff by name. This was in accord with the law of Pennsylvania.

In CLARK v. NORTH AMERICAN CO., 203 Pa. 346 (1902), the court said, at page 352:

> " * * * The proper way to submit it to the jury was to call their attention to the fact that the name used in the article did not refer to the plaintiff, but to one John Clark, a different person, but on the other hand the description pointed directly to the plaintiff and the jury should consider the whole article and

> determine from all the evidence, whether, notwithstanding the difference of name, the description was such either intentionally or by want of due care and diligence in ascertaining the true facts, that there would be a natural and reasonable inference that the plaintiff was the person referred to. If there would, the defendant was liable. * * * "

The jury was free to find that the second series of broadcasts referred to the plaintiff from the surrounding circumstances, to wit, that the plaintiff here was the plaintiff in the federal action which the broadcasts purported to report. The news director of WIP, Mr. Rust, was a broadcaster and a listener who knew that the second series of broadcasts was, and was intended to be, about the plaintiff. The law is clear that "[t]he fact that the plaintiff is not specifically named in the [publication] is not controlling. A party defamed need not be specifically named, if pointed to by description or circumstances tending to identify him: Burkhart v. No. American Co., 214 Pa. 39, 63 A. 410 (1906) * * *." COSGROVE STUDIO AND CAMERA SHOP, INC. v. PANE, *supra*, at 319.

In *Burkhart*, *supra*, it was held that the plaintiff was sufficiently identified in an article which referred to a bassoon player in the orchestra where the plaintiff was the orchestra's only bassoon player. So here, it would appear that Rosenbloom was the only distributor of nudist magazines in Philadelphia then in the process of seeking an injunction in the federal courts against raids.

IV.

The plaintiff was acquitted in his criminal trial springing from the arrest. The Pennsylvania court ruled as a matter of law that the magazines were not obscene. The admission into evidence of this acquittal and its use by the court are the bases of two assignments of error.

The defendant excepted to the court's charge that "Eden", the magazine purveyed by the plaintiff, was not obscene as a matter of law in the legal sense. See, *e. g.*, LUROS v. UNITED STATES, 389 F.2d 200 (C. A. 8, 1968). As to the defense of truth of defendant's characterization of "Eden" as "obscene," the court bifurcated the issue and instructed the jury that they must first decide whether the defendant used the word in the legal or in the lay sense. If they decided that it was used in the legal sense, the defense would fail. If used in the lay sense, the question of truth was for them to decide.

In its ruling that the magazines were not obscene in the legal sense as a matter of law, the court considered the opinion of Judge Ullman in the criminal prosecution in which the plaintiff was acquitted. We did so, however, not as a matter of applying State law under ERIE R. Co. v. TOMPKINS, 304 U. S. 64 (1938), but in order to determine whether the defense of truth was sufficient to go to the jury. To the extent that this essentially factual question turned on the content of the State obscenity law, the court made a legal determination. What our instruction reflected was a finding, as a matter of law, that the defendant failed to sustain its burden of proof that the magazines were obscene in the legal sense. The defendant offers no argument in its present motions that convinces us that this charge was in any way erroneous.

A related assignment by the defendant is that the plaintiff was allowed to introduce evidence of his acquittal in the criminal case and that the admission of such evidence was erroneous and prejudicial. We cannot agree.

Throughout the trial the defendant presented to the jury its defense of truth, *i. e.*, that the magazines were indeed obscene and smut and that the plaintiff was properly yclept a "smut peddler", etc. To this end the defendant adduced evidence that the plaintiff had been arrested on two occasions for the sale of the magazines in question and prosecuted under the state's obscenity law.

It should be noted, moreover, that calling a person a smut peddler and a distributor of obscene literature clearly imputes the commission of a crime, especially when it is reported that an arrest therefor has been made. Thus, the persistent defense of truth itself operated to blacken the character of the plaintiff in the eyes of the jury, not just making him out to be a seller of dirty books, but also one who is not above committing crimes in order to make his livelihood.[4] It is unthinkable that the jury not know the plaintiff had been acquitted of the charges against him. *Cf.* PURCELL v. WESTINGHOUSE BROADCASTING CO., *supra*, p. 183.

V.

The defendant argues that the award of punitive damages was improper because the evidence was insufficient that the defendant's conduct was malicious or reckless. The court properly charged on the law of Pennsylvania as to the standard for assessing punitive or exemplary damages:

> "Secondly, if you find that this publication arose from a bad motive or malice toward the plaintiff, or if you find that it was published with reckless indifference to the truth, if you find that it was not true, you would be entitled to award punitive damages, and punitive damages are awarded as a deterrent from future conduct of the same sort.
>
> "They really are awarded only for outrageous conduct, as I have said, with a bad motive or with reckless disregard of the interests of others, and before you would award punitive damages you must find that these broadcasts were published with a bad motive or with reckless disregard of the rights of others, or reckless indifference to the rights of

[4] There is authority that such persistence in the defense of truth may be evidence of the actual malice necessary for punitive damages. Montgomery v. Dennison, 363 Pa. 255, 267 (1949).

others; so that your verdict should be, if you find for the plaintiff, in two parts; one, general damages and, two, punitive damages."

See PURCELL v. WESTINGHOUSE BROADCASTING CO., 411 Pa. 167, 187 (1963).

To begin with, it is clear that no one at WIP harbored any personal animus toward the plaintiff George Rosenbloom. We are convinced, however, that there was sufficient evidence of a reckless disregard both of the truth of the defamatory assertions and the rights of the plaintiff to warrant the finding of punitive damages.

As the Pennsylvania Supreme Court said in CLARK v. NORTH AMERICAN CO., 203 Pa. 346, 354 (1902):

> "There was evidence in the case on which the jury might have found punitive damages, and it was error to take that matter away from them. The refusal or neglect to publish a retraction as to plaintiff after he had called defendant's attention to the injustice done him was in itself sufficient, and in this connection the tone and wording of the article itself as indicative of a desire to make a sensation, * * * were open for the consideration of the jury. * * * *"

Here is what happened when plaintiff tried to call "defendant's attention to the injustice done him." Late in October of 1963, about the 26th or 27th, the plaintiff, after hearing about the broadcasts that WIP had made concerning him, visited the station's offices and asked to hear or read the broadcasts so that he might determine whether or not what he had heard was true. He spoke to representatives of the news department by means of a telephone in the reception area, and the conversation was mechanically recorded. He specifically asked to hear and was read the 12 o'clock news broadcast of October 21, 1963. What was read to him referred to smut peddlers.[5]

[5] The broadcast for that time in the record referred to *alleged* smut literature.

When confronted with the article the plaintiff told the newscaster who read the broadcast to him, a man who identified himself as "Nate Wright," that the magazines in question "were found to be completely legal and legitimate by the United States Supreme Court." The plaintiff testified further as follows:

> "And the voice came back, 'Well, the District Attorney said they are obscene.'
>
> "I said, 'Are you sure you are quoting the District Attorney correctly because I have in my possession a public statement by the District Attorney that my magazines are completely legal, absolutely nothing obscene about them.' " (N.T. 175).

Thereupon, "Nate Wright" hung up.

There could be no more effective refusal to broadcast a retraction. Indeed, the jury may properly have thought (and we would agree) that this was even more reprehensible than a refusal to make a retraction. Plaintiff was not even accorded an opportunity to present his side of the story so that WIP could intelligently decide whether it should make a retraction. Such conduct is strong evidence of a lack of a good faith effort to ascertain the truth about the plaintiff and his business. It was a reckless disregard both of the truth of the previous broadcasts and of the rights of the plaintiff in the face of the plaintiff's representation that he was prepared to document his position that the District Attorney had stated that the magazines were not obscene.

Had WIP's representatives spoken with Mr. Rosenbloom or looked at the magazines and had still entertained an honest belief that the material was obscene or smut there might have been some basis for a finding that defendant was not reckless. But the abbreviated conversation with the plaintiff by telephone in defendant's offices, without confronting the plaintiff personally or examining the documentation he offered, was such depersonalizing

conduct as to manifest a reckless disregard for a person in no position to make himself heard.

The conduct of WIP when approached by the plaintiff, sufficient in itself as a basis of liability for punitive damages under CLARK v. NORTH AMERICAN CO., *supra*, was not the only evidence of a reckless disregard of the truth and of the rights of the plaintiff. The second series of broadcasts on October 21, 25 and November 1, describing a suit brought by the plaintiff to enjoin the raids and the reporting of them, contains defamatory assertions that were clearly false and was made at a time when the falsity of the assertions was readily ascertainable, both from an examination of the court records and of the magazines themselves. This is not then a case where a newsworthy incident occurs spontaneously and a news purveyor must rely on eyewitness accounts subject to the vicissitudes of human perception. *Cf.* ASSOCIATED PRESS v. WALKER, *supra*. The facts about which the broadcasts revolved were essentially static: what kind of magazines did the plaintiff sell; what was the nature of the suit he brought to protect his business.

Content with its ignorance of facts which would have been revealed upon the examination of material evidence, WIP relied on hearsay, and knowing its information was hearsay (or worse, conjecture), had the temerity to report that Mr. Rosenbloom and the publisher were "girly-book peddlers" and "smut distributors". These words are so highly colored that they smack of editorializing and a desire to create a sensation.[6] The broadcast of such language to describe a magazine distributor, because of its

[6] Malice may sometimes be proved intrinsically. An instruction to the jury to find "whether the publication itself, in its tone and format, revealed such malice as robbed it of its privileged character" was upheld in O'Donnell v. Philadelphia Record Co., *supra*, at 316. Although this was the "malice" that destroys the privilege, the "tone and format" of WIP's broadcasts, coupled with the evidence of the failure to verify the information they received, was properly for the jury's consideration and sufficient to find recklessness here.

great defamatory impact, supports part of "the basic theory of libel," that "words defamatory of another, are still placed 'in the same class with the use of explosives or the keeping of dangerous animals.' Prosser, The Law of Torts, §108, at 792." CURTIS PUBLISHING CO. v. BUTTS, *supra*, at 152. The jury could reasonably infer that the defendant was aware of this potential danger. It could properly conclude that the defendant's failure to examine material evidence which was available and yet to make such defamatory characterizations, knowing that such basic investigation had not been made, constituted a recklessness of conduct as to the rights of others sufficient to warrant punitive damages. Because the evaluation of the defendant's conduct necessitates an intrinsically subjective inquiry, we refuse to meddle with the fact-finding function of the jury.

Defendant at no time sought separate rulings by the court on the two different sets of broadcasts. It is now in no position to complain that the first set may not have afforded the basis for punitive damages. Since defendant itself was content to treat its conduct as one ball of wax, it cannot now complain that it was so treated in the verdict. Any other result would mean that a defendant, confronted with two bases of recovery, one of which may be vulnerable and the other not, could sit back and await an unfavorable result confident that he could successfully attack the entire verdict. This is not the intendment of F. R. Civ. P. 50(a) which commands that "[a] motion for a directed verdict shall state the specific grounds therefor."

The defendant assigns as error the court's failure to charge that the award of punitive damages must have a reasonable relationship to the amount of compensatory damages in accordance with the law of Pennsylvania. This is the general rule in Pennsylvania[7] and apparently applies in libel cases as well.[8]

[7] Suflas v. Cleveland Wrecking Co., 218 F. Supp. 289 (E. D. Pa. 1963).

[8] See Purcell v. Westinghouse Broadcasting Co., 411 Pa. 167, 187 (1963).

Although numerous points for charge were submitted by both sides, defendant made no request for such an instruction. At the conclusion of the charge, defendant excepted only to the submission of the question of punitive damages to the jury at all. The only "grounds of his objection," F. R. Civ. P. 51, were that this was not "a case in which there were facts for the jury to consider."

Federal Rule of Civil Procedure 51 provides that: "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." In PALMER v. HOFFMAN, 318 U.S. 109, (1942) the Court said, at page 119:

> "* * * In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the *precise nature* of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial. * * *" (Emphasis added)

Defendant's exception here not only fell short of suggesting substantive error in charge; indeed, it suggested that if punitive damages were recoverable, the charge was legally correct.

Nor is this a case of fundamental error going to the very issue of liability, as in the cases cited by defendant. MAZER v. LIPSCHUTZ, 327 F. 2d 42 (C. A. 3, 1964) (failure to charge on the vicarious liability of a surgeon); RATAY v. LINCOLN NATIONAL LIFE INSUR. CO., 378 F. 2d 209 (C. A. 3, 1967) (erroneous charge that burden of proof for defense of fraud could be sustained by a fair preponderance of the evidence). SUFLAS v. CLEVELAND WRECKING CO., 218 F. Supp. 289 (E. D. Pa. 1963) did not involve a determination of fundamental error. The only non-

substantive point briefed, argued and decided in that case was whether the failure to charge on necessary relationship between compensatory and punitive damages was harmless error.

We are not here concerned with whether the error was harmless, but whether it was so fundamental that an entire new trial should be ordered, even though the only question would be the amount of punitive damages. For that question could not be determined without showing the totality of the circumstances. And this, only because of the lack of an instruction which defendant failed to request. The salutary purpose of Rule 51 was to prevent just such an horrendous result, and we refuse to disregard that purpose.

VI.

A

The defendant argues that it was error for the court to admit certain "hearsay" testimony by the plaintiff of what certain newsboys with whom he dealt said to him. One newsboy said, according to the plaintiff, that "WIP radio was really blasting me, they were really knocking me." The plaintiff then testified as to the effect of this statement on him.

This testimony of the plaintiff was not admitted for the truth of its assertion, to wit, that WIP was in fact "blasting" the plaintiff (this was already in evidence through the introduction of the scripts), but to show what effect this statement had on the plaintiff. It constituted a verbal act.

B

The plaintiff testified that 34 of his original 60 customers refused to do business with him, and that "They told me, in fact, 'You are a racketeer. We won't have anything to do with you.' "

The reasons given by the plaintiff's customers for refusal to deal constituted a well-established exception to the hearsay rule: "a declaration of a present existing *motive* or *reason* for action." WIGMORE, EVIDENCE §1729(2), Vol. VI (3d Edition); DE RONDE v. GAYTIME SHOPS, INC., 239 F. 2d 735, 739 (C. A. 2, 1956), (a defamation case).

In any event, that evidence was offered and admitted solely on the issue of special damages. Since that issue was taken from the jury, the error, if any there was, was not prejudicial to defendant.

C

The defendant charges that it was error for the court to exclude the testimony of Paul Rust, news director of WIP, concerning the verification and investigation practices of other news departments in the Philadelphia community. The defendant is correct in its position that Rust's testimony was relevant. It was, however, incompetent because it was based on hearsay as to what other newsmen and news directors had told Rust.

VII.

Although there was warrant in the record for assessing punitive damages, we believe that $725,000 is excessive in light of the function that punitive damages serve; punishing the defendant for its conduct in regard to the present case and deterring future derelictions. This is not to say that the award was the result of bias or prejudice. The jury may, however, have been unduly impressed by the fact that the worth of the defendant was estimated to be approximately $100,000,000. Since we are convinced that the award punishes the defendant far beyond the needs of this case, it is our duty to order a remittitur or a new trial. LINN v. UNITED PLANT GUARD WORKERS

OF AMERICA, 383 U. S. 53, 65-66 (1966). This duty of the court has been stated broadly:

> "* * * The court may set aside an award of punitive damages deemed to be excessive or against the weight of the evidence, or larger in amount than the court thinks it justly ought to be. The trial court has a greater role than the court on appeal but we may note that its function may encompass a duty, and not merely an opportunity, to avoid excessive damages by remittitur or new trial. [citing Linn, supra]. * * *" Afro-American Publish-Co. v. Jaffe, 362 F.2d 649, 662 (C. A. D. C. 1966).

Cf: CURTIS PUBLISHING CO. v. BUTTS, *supra*, at 160.

The practice of the Pennsylvania courts in reducing punitive damage awards deemed excessive has been flexible. In *Purcell* the court reduced a punitive damage award "with justice to all parties concerned," 411 Pa. at 188, in spite of the fact that it stated: "The learned court below, in an able opinion, reasoned the justification of this award and we cannot say that it was not warranted in its rationalization." *Ibid.*, at 187.

Our conclusion that the punitive damages awarded are excessive is not based upon the fact that the plaintiff, entitled only to $25,000 compensatory damages, would receive a hugh windfall. The theory of punitive damages does not take into consideration the degree to which the plaintiff will benefit from the award. Rather, we look to the seriousness of the defendant's conduct and the degree to which it will be punished and deterred by this award. Our reaction is admittedly visceral. We conclude that punitive damages in the sum of $250,000 will adequately and justly both punish the defendant and deter it from future reckless conduct.

We have considered the other grounds urged by defendant and find them without merit.

APPENDIX C

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed August 28, 1968, be, and the same is hereby reversed and the case remanded to the District Court for entry of judgment in favor of appellant. Costs taxed in favor of appellant.

ATTEST:

/s/Thomas F. Quinn
Clerk



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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969.

No. ~~947~~. 66

GEORGE A. ROSENBLOOM,

Petitioner,

v.

METROMEDIA, INC.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

SCHNADER, HARRISON, SEGAL & LEWIS,
1719 Packard Building,
Philadelphia, Pa. 19102

COUDERT BROTHERS,
200 Park Avenue,
New York, New York 10017
Of Counsel.

BERNARD G. SEGAL,
IRVING R. SEGAL,
SAMUEL D. SLADE,

CARLETON G. ELDRIDGE, JR.,
Attorneys for Respondent.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

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IN THE

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OCTOBER TERM, 1969

No. 947

GEORGE A. ROSENBLOOM,

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v.

METROMEDIA, INC.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Third Circuit is not yet reported. The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 289 F. Supp. 737 (E. D. Pa. 1968). Both opinions are printed as appendices to the petition herein.

JURISDICTION.

The judgment of the Court of Appeals was entered on September 15, 1969. The petition for a writ of certiorari was filed on December 12, 1969. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether the court below correctly rejected the contention that the First Amendment protection defined by this Court in *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964) must be limited to factual situations in which the defamation plaintiff is a public official or a public figure.

2. Whether the court below correctly held that the evidence adduced by petitioner in this case failed to establish that the broadcasts in issue were made with actual malice or with a high degree of awareness of their probable falsity.

CONSTITUTIONAL PROVISIONS INVOLVED.

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE.

In 1962, Outdoor American Company, a publisher of several so-called "nudist" magazines, offered to petitioner Rosenbloom a distributorship which covered a substantial regional area from Atlantic City to Harrisburg and from Wilmington to Trenton (96a-97a).[1]

After some investigation (45a-97a), Rosenbloom accepted the distributorship and entered into the business on May 1, 1963 (179a). In six months, he had already obtained outlet accounts with sixty newsstands, drug stores, and other vendors (188a).

In the fall of 1963, the Philadelphia police began to receive complaints concerning the allegedly obscene and offensive nature of certain periodicals available at various newsstands throughout the city (259a-260a). Under the supervision of Captain Clarence Ferguson, an experienced officer who had participated in investigating alleged obscenity law violations for more than forty years (247a), the police began an investigation which ultimately focused on twenty-one particular newsstands. On October 1, 1963, the police began a series of arrests and confiscations later described by Captain Ferguson as "one of the largest raids in the City of Philadelphia" (249a).

George Rosenbloom was among the twenty-two individuals arrested on October 1. The other twenty-one were all newsstand dealers. Rosenbloom, the only distributor arrested, was supplying fifteen of the twenty-one dealers with his publications (99a).

Three days after his arrest and release on bail on October 1, the police rearrested Rosenbloom and seized a large supply of Outdoor American publications kept at his home and at a nearby rented barn (100a, 263a). By that time, October 4, the total number of arrests of dealers, dis-

1. References to "a" pages are to the printed appendix on appeal.

tributors and shippers of allegedly obscene periodicals had reached twenty-nine (99a-100a, 273a, 347a). Captain Ferguson notified the local news media, including Station WIP, a radio station managed and controlled by respondent, that he had uncovered the supply of "one of the main distributors for the City of Philadelphia of these obscene books" (251a).[2]

On October 1, 1963, the local newspapers, the radio and television stations, and the United Press Wire Service all began detailed and extensive coverage of the police investigation and arrests (211a-215a, 414a-415a). Rosenbloom's arrest was included in the media reports.

On October 4, 1963, Station WIP, managed and controlled by Metromedia, following the report to it that day by Captain Ferguson, made its first broadcast referring to Rosenbloom's arrest. By this time, Rosenbloom's name had been in the news since October 1 (211a-215a, 406a-407a). The arrest was one of seven items reported on the five-minute, six o'clock newscast. All of the news bulletins concerned events which had occurred that day. The Rosenbloom arrest was noted as having occurred "this afternoon" (350a-351a). The station relied on Captain Ferguson as the source of its information (290a). Ferguson had made reports frequently in the past and had always been found reliable and accurate (293a-294a).

Station WIP included the arrest item in eight of its twenty-eight five-minute bulletins given every half-hour over the following fourteen hours, the last reference occurring at 8:00 a.m., October 5. In those eight bulletins, WIP summarized seventy-two news items describing current

2. There is no basis in the record or in fact for the statement in the petition (p. 5) that Rosenbloom's arrest was "* * * fortuitious, since the campaign was directed not at his publications but at more lurid material." To the contrary, Captain Ferguson specifically described Rosenbloom to Station WIP as one of the major distributors of objectionable literature in the City (251a).

events of the day locally and throughout the world (350a-372a).[3]

The first and second broadcasts by WIP on October 4, 1963, beginning at 6:00 p.m., read as follows (350a):

> "The Special Investigations Squad raided the home of George Rosenbloom in the 1800 block of Vesta Street this afternoon. Police confiscated 1,000 allegedly obscene books at Rosenbloom's home and arrested him on charges of possession of obscene literature. The Special Investigations Squad also raided a barn in the 20 Hundred block of Welsh Road near Bustleton Avenue and confiscated 3,000 obscene books. Capt. Ferguson says he believes they have hit the supply of a main distributor of obscene material in Philadelphia."

Rosenbloom's trial counsel conceded that the first and second sentences, which were true, and the fourth sentence, which was merely a report of a police officer's opinion, were not actionable (310a). The contention as to this set of broadcasts rested on the omission in the third sentence of the word "allegedly" before the word "obscene", on the apparent theory that this omission converted the third sentence into a statement of opinion by Station WIP (311a). The next six broadcasts in the series which began on October 4 and ended at 8:00 a.m. on October 5, 1963, included the word "allegedly" or "reportedly" in the third sentence reference to Rosenbloom's publications (350a, 368a).

On October 15, 1963, Rosenbloom, together with two publishers, began a lawsuit in federal court seeking injunc-

3. Station WIP broadcasts the news every half hour, twenty-four hours a day, seven days a week—a total of 336 broadcasts a week, each containing from five to twelve or more news items (58a, 288a).

tive relief and damages against the City of Philadelphia, the District Attorney, the Police Commissioner, The Evening Bulletin, Triangle Publications, Inc. (publisher of the Philadelphia Inquirer and the Philadelphia Daily News) and WCAU-TV, a local Columbia Broadcasting System television station (402a-418a). He claimed that the defendants had published stories on October 1, 2 and 3 falsely describing him as a dealer in smut and obscenity (211a-215a, 406a-407a). Rosenbloom did not name Station WIP as a defendant.

The district judge assigned to the case set October 21, 1963 as the date for argument on the defendants' motion to dismiss. Station WIP learned of the suit either through the wire service or as the result of individual calls (55a, 56a, 72a). On October 21, in an early morning broadcast, which covered twelve current news items in five minutes, Station WIP described the lawsuit and noted the hearing (369a-372a). Rosenbloom was not named in the broadcast. The station referred to the lawsuit, without mentioning Rosenbloom's name, in eight other broadcasts on October 21 (369a-392a). Station WIP also referred to the progress of the lawsuit in two bulletins on October 25 and one again on November 1, 1963, all without reference to the identity of the plaintiffs in the action (303a-401a). The broadcasts ranged from ninety seconds to ten minutes in length and covered as many as eighteen different local, national, and international news items.[4]

Rosenbloom's suit for damages was based on the first two of the series of broadcasts made on October 4th and

4. The petition for certiorari erroneously states (p. 6) that the second series of broadcasts, which began on October 21, referred to Rosenbloom as a "girlie-book" or "smut" peddler. As noted above, no one of the second series of broadcasts referred to Rosenbloom by name. Further, there was no evidence produced at the trial to establish that any member of the public understood that this series of broadcasts referred to Rosenbloom.

5th and on the series of broadcasts beginning on October 21 with reference to the court proceeding against the City of Philadelphia, Philadelphia officials and various news media. At the conclusion of the trial, the District Judge declined to view the case as appropriate for the application of the principles of *New York Times v. Sullivan*, 376 U. S. 254 (1964) as a limitation on the right of Rosenbloom to recover. Metromedia's motion for a directed verdict (241a) and for a binding instruction (427a) were denied. Instead, the jury was instructed to consider the case under the principles of Pennsylvania defamation law (324a-334a). The jury was instructed that the state law of defamation extended a privilege to Station WIP to report certain news events conditioned on reasonable conduct in making the report and the use of reasonable diligence to determine the accuracy of the broadcasts (325a-327a). On the question of punitive damages, the jury was instructed that punitive damages could be awarded if the broadcasts resulted "* * * from a bad motive or malice toward the plaintiff * * *" or were published "* * * with reckless indifference to the truth * * * or with reckless disregard to the rights of others or reckless indifference to the rights of others * * *" (333a). The jury returned a verdict in favor of Rosenbloom for $25,000 actual damages and $725,000 punitive damages (343a). The District Judge reduced the punitive award to $250,000 on remittitur (458a).

After the jury had returned its verdict, the trial judge again rejected the contention that the principles of the *New York Times* case controlled the case and denied alternative motions for judgment n.o.v. or for a new trial (442a, 457a). In connection with the denial of these motions, the trial judge filed an opinion (435a-456a).

The Court of Appeals reversed the district court and held that Rosenbloom should have been required to meet

the "actual malice" standard of proof formulated in *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964). The court emphasized two distinct and separate factors in its decision: (1), that the subject matter of the broadcasts was of legitimate and established public interest; and (2), that the broadcasts were of "hot news", reported under conditions where, as the court said, "it is not realistic to require thorough research or verification of each individual item" (Pet., pp. 20-22).

Having determined that the *New York Times* principle should have been applied, the Circuit Court then reviewed the record to determine whether the plaintiff had produced "convincingly clear" evidence that Station WIP had made the broadcasts with a "reckless disregard of the truth" (Pet., pp. 24-26). As already noted, the District Judge had declined to charge the jury that the *New York Times* principle was applicable to the case. In sustaining the award of punitive damages, the evidence most heavily relied upon by the District Judge concerned Rosenbloom's brief conversation with a part-time employee at Station WIP (Pet., pp. 40-44). On this basis, the District Judge concluded that there was "* * * a recklessness of conduct as to the rights of others sufficient to warrant punitive damages." (Pet., p. 44).

The actual occurrence was as follows. On October 26 or 27, Rosenbloom visited Station WIP to find out if WIP had, in fact, been making broadcasts about him and, if so, what they were (133a-137a). He spoke to a part-time newscaster on an inter-office telephone and specifically requested that the noon broadcast of October 21 be read to him (137a). After the broadcast was read to him, Rosenbloom stated that the magazines had been "* * * found to be completely legal and legitimate by the United States Supreme Court" and that he possessed a statement by the Philadelphia District Attorney that his magazines were "* * * completely

legal • • •'" (137a-138a).[5] The newscaster replied that the District Attorney had said that the magazines involved in the federal court suit and referred to in the October broadcasts were obscene (137a). After this exchange, "• • • the telephone conversation was terminated. • • • He [the newscaster] just hung up." (138a).

In considering whether there was constitutionally sufficient evidence to sustain a jury verdict in favor of Rosenbloom, the Court of Appeals examined this so-called retraction incident. The Court of Appeals stated (Pet., p. 25):

> "• • • We think the evidence of the incident lacked both sufficient substance and clarity to meet the standard required to show actual malice. It amounted to little more than an argument and a difference of opinion between plaintiff and one of defendant's employees at a time when all except one of the challenged broadcasts had already taken place. Its value in considering the earlier broadcasts is dubious at best . . . We think that the episode described failed to provide evidence of actual malice with the requisite convincing clarity to create a jury issue under federal standards."[6]

The Court of Appeals next noted that Station WIP could not be expected to make thorough investigations of

5. The petition for certiorari (pp. 4, 5) follows the line, also pressed in the court below, that there is some relationship between the issue in this case and the fact that, at a time long subsequent to the date of the broadcasts here involved, Rosenbloom's magazines were held not to be obscene in a criminal proceeding. It is obvious, we submit, that there is no such relationship.

6. Rosenbloom's visit to Station WIP took place on October 26 or 27, after all but one of the broadcasts here involved had occurred (133a-135a). The only remaining broadcast, that of November 1, is conceded to be accurate. It should be noted that, during the course of trial, no witness was produced by the plaintiff who had heard either of the series of broadcasts and there was, accordingly, no evidence that any member of the public understood the second series of broadcasts to refer to Rosenbloom.

"hot news" items, and that, in holding to the contrary, the district court had placed an improper burden on the station (Pet., pp. 25-26). As the court had earlier observed, the primary value of "hot news" to the public lies in conveying the latest news as promptly as possible so that the public may be informed of news items of immediate public concern. Station WIP had received the story from a police officer who had always been reliable in the past and the station had no reason to doubt the accuracy of his report.

Finally, the Court of Appeals noted that the district court, in sustaining the punitive damage award, had characterized "highly inflammatory references" in the second series of broadcasts as evidence of a reckless disregard of plaintiff's rights and observed that (Pet., p. 26):

> "It is difficult to see how characterizing them as inflammatory tends to prove the requisite awareness of their probable falsity".

The Court of Appeals thus concluded that the evidence was constitutionally insufficient to support a judgment for the plaintiff, and that the district court should have granted defendant's motions for judgment (Pet., p. 26).

ARGUMENT.

A. The Court of Appeals Decision Is Clearly Correct in Applying the Protective Principles of the *New York Times* Case to the Broadcasts at Issue.

In holding that the broadcasts at issue here concerned matters of substantial public interest and therefore were entitled to the First Amendment protection defined in the *New York Times* case, the Court of Appeals correctly applied the basic proposition recognized by this Court that "freedom of expression upon public questions is secured by the First Amendment." See *New York Times*, 376 U. S. at 269; *Thornhill v. Alabama*, 310 U. S. 88, 95 (1940). There is no need for this Court to review that fundamental constitutional proposition merely because it has now been applied by the Court of Appeals to factual circumstances inevitably differing in immaterial particulars from the cases in which the proposition has been recognized. The proposition can not be questioned, and its application in this case is entirely consistent with and supported by the decisions in which the nature and scope of the constitutional principles have been defined.

Petitioner insists, however, that this Court has never actually applied the *New York Times* constitutional protection to defamatory statements about individuals who are neither "public officials" nor "public figures". Literally, the statement is accurate, primarily because the Court has never had that particular set of facts before it for decision in a defamation context. But this literal accuracy does not in any way detract from the correctness of the decision below, or create a need for review by this Court. On two recent occasions, the same contention—that the protective principle of the *New York Times* case must be restricted

to factual situations in which the defamation plaintiff is a public official or a public figure—has been unsuccessfully presented to this Court. *Time, Inc. v. McLaney,* 406 F. 2d 565 (5th Cir. 1969), *cert. denied,* 395 U. S. 922 (1969); *United Medical Laboratories, Inc. v. Columbia Broadcasting Systems,* 404 F. 2d 706 (9th Cir. 1968), *cert. denied,* 394 U. S. 921 (1969).

In the *New York Times* case, in *Curtis Publishing Co. v. Butts,* 388 U. S. 130 (1967), in *Associated Press, Inc. v. Walker,* 388 U. S. 130, 155 (1967), and in *Time, Inc. v. Hill,* 385 U. S. 374 (1967), this Court has explained the basis for the First Amendment protection at issue with sufficient clarity to allow the lower courts to apply the principle in different factual contexts. As the Supreme Court has already suggested, case-by-case evolution must mark the outer limits of the *New York Times* doctrine. *St. Amant v. Thompson,* 390 U. S. 727, 730 (1968). It could hardly be suggested that this process, which will be developed by the endlessly differing circumstances in which defamation actions may arise, must be conducted exclusively by the Supreme Court. Where the constitutional principles are clear and the analytical procedures have been specifically described, it is most appropriate that the lower courts map out the factual boundaries of a constitutional doctrine.

Perhaps the simplest authoritative statement of the Supreme Court's application of First Amendment protection to defamatory statements may be found in *Rosenblatt v. Baer,* 383 U. S. 75, 85, fn. 10 (1966), where Mr. Justice Brennan observed that

> "... the public interests protected by the *New York Times* rule are interests in discussion, not retaliation ... *the scope of the privilege is to be determined by reference to the function it serves* ...." (Emphasis added.)

The issue is to determine what function the First Amendment privilege serves in a particular case. In the *New York Times* case, in *Butts*, in *Walker*, and in *Hill*, as well as in the case presently before the Court, the function served was to provide the public with information on matters in which it had a legitimate and substantial interest. If the plaintiff in a particular case occupies a position of some "public" status, the public may have a legitimate and substantial interest in statements about him solely for that reason. But this would merely be an incidental aspect of the broader base of the First Amendment protection, the right to inform the public on matters of legitimate public interest, not the basis for a mechanically restrictive rule.

In this case, the public interest lay in Rosenbloom's substantial involvement in various police investigations, and in his court suit against the City and its news media. The public had a legitimate interest in his activities whether or not he had theretofore been a person of public prominence. Because the First Amendment privilege as applied to these broadcasts would thus serve the same function, *i.e.*, informing the public on matters in which it has a legitimate interest, as it served in *New York Times*, *Butts*, *Walker*, and *Hill*, the privilege must be given the scope declared necessary by this Court in those cases.

The lower courts participating in the case-by-case evolution foreshadowed by this Court in *St. Amant*, have consistently understood that the "public issue" test is constitutionally and logically demanded by the protective principles fashioned in the *New York Times* case and by the analytical approach defined in *Rosenblatt*. Recognizing that the public interest in the statements at issue was the basis for the grant of constitutional protection in the *New York Times* case, in *Garrison v. Louisiana*, 379 U. S. 64, 74-75 (1964), in *Butts*, 388 U. S. at 150-152, and in *Walker*, 388

U. S. at 155, and the clear holding of this Court in *Time, Inc. v. Hill,* 385 U. S. 374, 387-388, both the Court of Appeals for the Ninth Circuit and the Court of Appeals for the Fifth Circuit have explicitly recognized the inevitable applicability of the public interest test in a defamation context. In each case, this Court denied certiorari. See *Time, Inc. v. McLaney,* 406 F. 2d 565 (5th Cir. 1969), *cert. denied,* 395 U. S. 922 (1969); *United Medical Laboratories, Inc. v. Columbia Broadcasting Systems,* 404 F. 2d 706 (9th Cir. 1968), *cert. denied,* 394 U. S. 921 (1969). Other courts have also recognized that the "public official" and "public figure" cases in this Court were but specific applications of the broader constitutional principles upon which those decisions are founded, and consequently have not viewed the status of the plaintiff as critical but have accepted and applied the "public issue" basis for application of the First Amendment privilege. See *Bon Air Hotel, Inc. v. Time, Inc.,* 295 F. Supp. 704 (S. D. Ga. 1969); *All Diet Food Distributors, Inc. v. Time, Inc.,* 290 N. Y. S. 2d 445 (N. Y. Sup. Ct. 1967); *Fotochrome, Inc. v. New York Herald Tribune, Inc.,* (Sup. Ct. of N. Y., Queens County, decided October 24, 1969, Index #12784/65); *Farnsworth v. Tribune Company* (Sup. Ct. of Ill.), decided November 26, 1969, No. 41699. These cases all conform to the principles and analysis announced by this Court and are further evidence of the correctness of the decision of the court below in applying the "public issue" test to this case.

It is clear, then, that the Court of Appeals has here applied the proper protective principles to this case. However, it may be useful to the Court for respondent to summarize briefly the nature of the public interest in the WIP broadcasts. It is also necessary to dispel the inaccurate impression created by the petition that Rosenbloom was not a person of legitimate interest to the public before the news media reports were published.

It is no doubt true that Rosenbloom did not desire to have the public learn that he had been arrested for selling obscene literature. The petition is also reasonably accurate in describing Rosenbloom as "unknown to the public" prior to WIP broadcasts. However, it is *not* true that Rosenbloom was "of no interest" to the public, nor is the petition accurate in stating (p. 9) that such interest as the public may have had was manufactured by the misrepresentations of the news media.

Rosenboom had entered into a business where his success depended upon his ability to sell Outdoor American's nudist literature to the public. Regardless of its legality, the product which he chose to sell was inevitably controversial in nature. Nudity on sale at public newsstands may not be obscene under current legal standards, but it is certainly controversial. Indeed, Rosenbloom was aware of the risk in his business. Outdoor American offered the distributorship of its publications to Rosenbloom in the summer of 1962 but Rosenbloom did not accept until May, 1963 (96a-97a). In the interim, Rosenbloom retained a lawyer to investigate the legality of the magazines and their publisher (95a-97a).

Vendors in the public market depend upon some public approbation for their success, and likewise must accept some public disapprobation as a risk of their business. In this case, some members of the public objected to Rosenbloom's periodicals. They complained to the police. The police investigated, and agreed with the complaining members of the public. They began an extensive crackdown on controversial nudist literature. They arrested Rosenbloom and fifteen of the newstand dealers whom he supplied, later rearrested Rosenbloom and seized his periodicals, and identified him as one of the major sources of obscene literature in the city. Thus, Rosenbloom had become of interest to the public before any media reports. The media merely

communicated to the public the events in which the public had a legitimate interest.

Rosenbloom then took the offensive and brought a dragnet lawsuit. He sued the City, the Police, the District Attorney, the newspapers, a television station—but not Station WIP. He asked for a million dollars in damages from the City Treasury and from the news media. Here, again, was a matter of legitimate public interest.

Yet petitioner argues that, even after the arrest, the rearrest, and the confiscation of the magazines,[7] the public interest in the WIP broadcasts was "kindled chiefly by the misrepresentations of the media." It is obvious that WIP had no part in Rosenbloom's becoming a distributor of nudist magazines; nor did it investigate or arrest him or confiscate his magazines; nor did it force him to sue the City and the other news media. Rosenbloom did some of these things, and some of these things were done to him as a result of his involvement in a "purposeful activity" —selling controversial nudist literature—and he thereby "thrust . . . his personality into the 'vortex' of an important public controversy." *Associated Press v. Walker*, 388 U. S. at 155.

Thus, Rosenbloom became inextricably involved in matters of public interest. His connection with matters of public interest effectively destroyed the existence of and the right to that anonymity upon which he now rests his right to recover damages. All Station WIP did was report to the public the matters of public interest in which Rosenbloom had become involved. WIP did not create those matters or that involvement.

In summary, the Court of Appeals in this case has simply applied the constitutional principles delineated by

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7. The first WIP broadcast mentioning Rosenbloom did not occur until *after* the second arrest and the confiscation.

this Court in *New York Times* and the cases following it to a set of facts inevitably different from the particular facts considered by the Court in those cases. The factual differences are not of constitutional significance. Here, as in the *McLaney* case and the *United Medical* case, the protective First Amendment principles at issue have been correctly interpreted and applied.

B. There Is No Need for This Court to Review the Court of Appeals Decision That There Was No Constitutionally Sufficient Evidence of Actual Malice to Support a Judgment for Petitioner.

The second of petitioner's "Reasons for Granting the Writ" assumes a holding by this Court that the Court of Appeals was correct in applying the protective principles of *New York Times* to this case. Essentially, petitioner simply argues that the evidence of "actual malice" was sufficient to support a judgment for petitioner at trial. He asks this Court to review the Court of Appeals' decision in order to determine the correctness of the appellate court's evaluation of the evidence in the record. In this connection, petitioner makes the curious argument that the conclusion reached by the Court of Appeals after careful examination of all the evidence would be changed by an "additive" consideration of the same evidence (Pet., p. 15).

The procedure followed below in assessing the evidence was clearly correct. The Court of Appeals examined the record to determine, in the words of this Court, whether there was:

> ". . . sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts

as to the truth of his publications." *St. Amant v. Thompson,* 390 U. S. at 731 (1968).

In analyzing the evidence presented at trial, the Court of Appeals evaluated each separate evidentiary item to determine its constitutional sufficiency, exactly as this Court did in the *New York Times* case, 376 U. S. at 286-292. The Court of Appeals found that the "retraction" incident, which occurred after all but one of the broadcasts had been made, was of dubious value "at best" with respect to the earlier broadcasts, and thus could not provide evidence of defendant's "serious doubts as to the truth" of the publications with the requisite "convincing clarity" demanded by this Court. The one broadcast following the retraction incident was conceded to be entirely accurate.

Having rejected the retraction evidence as insufficient, the Court of Appeals emulated this Court in the *New York Times* decision (376 U. S. at 287-288) and considered the evidence of WIP's failure to investigate the truth of the broadcasts. Noting again that Station WIP had not been put on notice of any inaccuracy in its reports until the next to last broadcast, and that the last report was accurate, the Court of Appeals concluded that the "hot news" service provided by Station WIP in frequently reporting important current developments was important to the public and protected by the First Amendment, that the Station had relied on Captain Ferguson, always accurate in the past, and that the investigatory burden suggested by the district court was not constitutionally permissible. The proposition that full investigation cannot be expected in reporting "hot news" has already been suggested by this Court in *Associated Press v. Walker,* 388 U. S. at 157. Further, this Court has repeatedly held that investigatory failures are not sufficient evidence of a reckless disregard of the truth. *St. Amant v. Thompson,* 390 U. S. at 733;

Beckley Newspapers v. Hanks, 389 U. S. 81, 84 (1967); *Curtis Publishing Co. v. Butts*, 388 U. S. at 153; *New York Times v. Sullivan*, 376 U. S. at 286.

The Court of Appeals then noted in conclusion that the "inflammatory" language of the broadcasts could hardly be probative of WIP's "degree of awareness of their probable falsity," *Garrison v. Louisiana*, 379 U. S. at 74. As has been recently held by the Court of Appeals for the District of Columbia, ". . . the seriousness of a charge, in itself, is not probative of recklessness with respect to the truth." *Washington Post Co. v. Keough*, 365 F. 2d 965, 970 (D. C. Cir. 1966).

Thus, it is clear that in reviewing the evidence to determine its constitutional sufficiency, the Court of Appeals correctly applied the principles and the analytical techniques established by this Court. There is no need for further review of the evidence itself.

Petitioner further argues (Pet., p. 15) that "the jury to all practical effect made a finding of actual malice in awarding punitive damages" under Pennsylvania state law. The importance of precise instructions in a case involving the *New York Times* principle was emphasized by this Court in *Butts*, where Chief Justice Warren warned (388 U. S. at 166):

> "Unquestionably, in cases tried after our decision in *New York Times* we should require strict compliance with the standard we established . . . ."

Here, the jurors were instructed on state law *only;* they were never made aware of the First Amendment protection to which Station WIP was entitled; they were never instructed that plaintiff had to prove that defendant had "in fact entertained serious doubts as to the truth" of the broadcast. Instead, the jurors were charged that they might

predicate punitive damages upon defendant's "ill will" toward the plaintiff, or "* * * from a bad motive or malice toward the plaintiff * * * or reckless disregard of * * * or reckless indifference to the rights of others * * *" (333a). The findings of a misinformed, erroneously instructed jury could hardly be considered probative with respect to the very issue upon which the jury was improperly charged.

CONCLUSION.

The decision of the court below is clearly correct and the petition for a writ of certiorari should be denied.

Respectfully submitted,

SCHNADER, HARRISON, SEGAL & LEWIS,
1719 Packard Building,
Philadelphia, Pa. 19102,

BERNARD G. SEGAL,
IRVING R. SEGAL,
SAMUEL D. SLADE,

COUDERT BROTHERS,
200 Park Avenue,
New York, N. Y. 10017,

CARLETON G. ELDRIDGE, JR.,
Attorneys for Respondent.

Of Counsel.

January 9, 1970.

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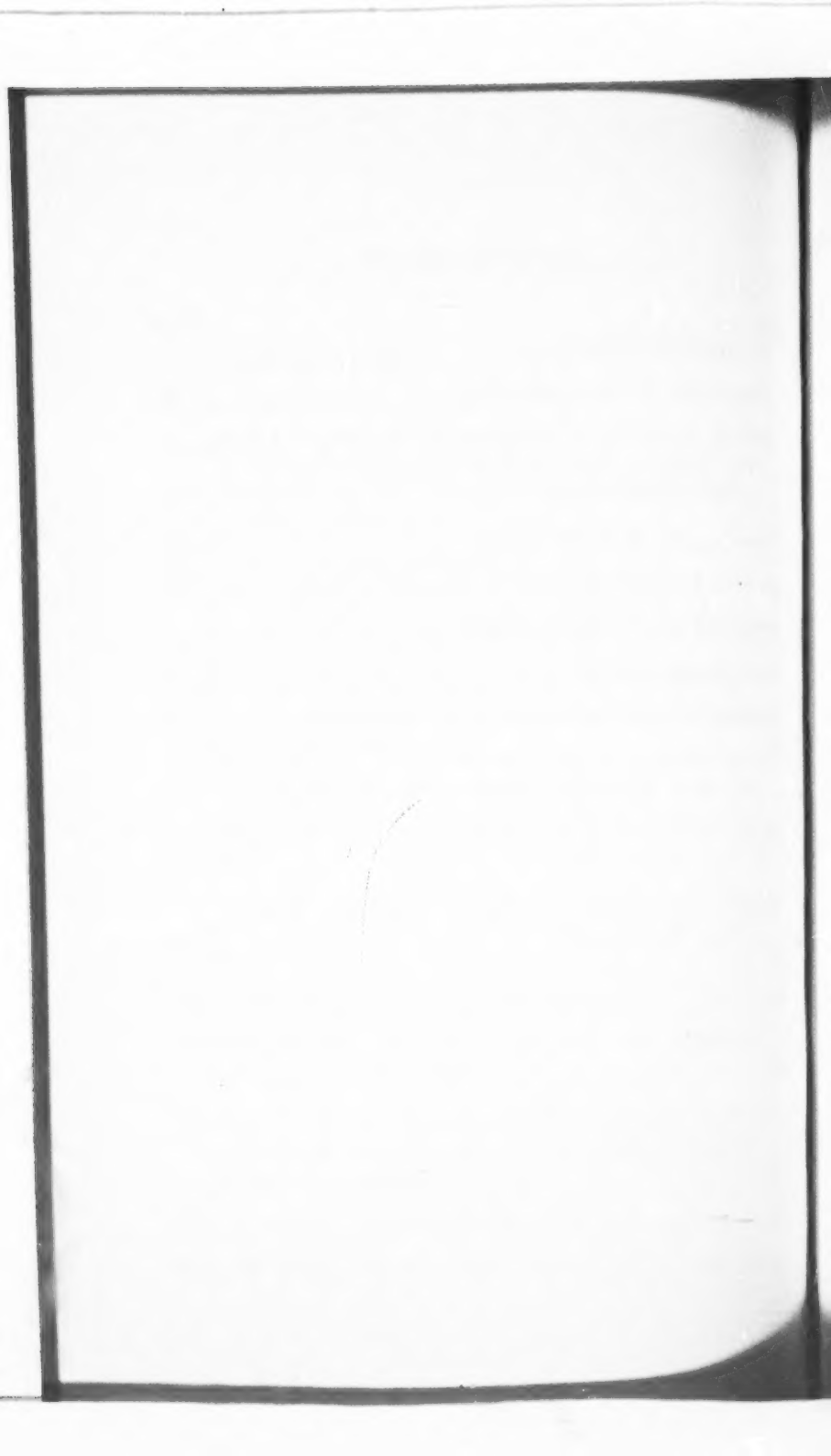
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IN THE

Supreme Court of the United States

October Term, 1969

No. 947

GEORGE A. ROSENBLOOM,

Petitioner,

vs.

METROMEDIA, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the Court of Appeals for the Third Circuit (A461) is reported at 415 F. 2d 892 (1969). The opinion of the United States District Court for the Eastern District of Pennsylvania (A435-56) is reported at 289 F. Supp. 737 (1968).

Jurisdiction

The judgment of the Court of Appeals was entered on September 15, 1969 (A472). A timely petition for a writ of certiorari was filed on December 12, 1969, and was granted February 24, 1970. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Questions Presented

1. Should the rule established in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), be broadened to prohibit a private citizen who is neither a public official nor a public figure from recovering damages for a defamatory falsehood relating to his involvement in a matter of public interest unless he proves that the statement was made with "actual malice"?

2. If a private citizen who is neither a public official nor a public figure must prove, in order to recover damages, that a defamatory statement was made with "actual malice," was the evidence in this case sufficient to support this finding by the jury?

Constitutional Provisions Involved

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Statement of the Case

A federal trial jury awarded general and punitive damages for libel to the petitioner George A. Rosenbloom, a small independent distributor of magazines published by nudist groups, who was erroneously accused by Metromedia's Philadelphia radio station of being a "smut distributor" and "girlie book peddler." Another jury, in a Pennsylvania state court, had previously acquitted him of these charges in a separate criminal trial, under instructions that as a matter of law his magazines were not obscene (A224).

There is no issue concerning obscenity or "hard-core" pornography in this case. Any question on that score ended with Mr. Rosenbloom's acquittal in his trial for possession of obscene material. This case presents only the question whether a jury verdict awarding damages for libel should be disturbed.

When this controversy arose in October 1963, Mr. Rosenbloom had only recently given up his job as a salesman for the largest book and magazine distributor in the country to launch his own business. The Outdoor American Publishing Company had initially offered him a distributorship for the Philadelphia area the preceding year. Mr. Rosenbloom investigated the offer thoroughly. He found that the president of the company operated a nudist camp in Spokane, Washington. A lower court had once found his magazines promoting nudism obscene, but the Solicitor General confessed error when the case reached this Court. *Mounce v. United States*, 355 U.S. 180 (1957). The vice-president of the company, who made the offer of a distributorship, owned a nudist camp in Mays Landing, New Jersey, where he was an officer of the local Chamber of Commerce (A95-97).

Mr. Rosenbloom accepted the offer in May 1963 and agreed with the company to distribute only its publications (A97, 123). He was the newest and smallest distributor in Philadelphia, but his business prospered. His home was his office and his inventory was stored in a rented barn. By October 1 he had established accounts with 60 outlets (A98). On that day, Captain Clarence Ferguson, who headed the police department's Special Investigation Squad, decided to rid the city of pornography. He initiated a series of raids on city newsstands, during one of which Mr. Rosenbloom was arrested, apparently fortuitously, as he was making a delivery (A255-57). The police had received complaints that lurid materials were being sold, but there was no evidence that any of these complaints were directed at Mr. Rosenbloom's nudist magazines (A260). Three days later, the police raided his home and the rented barn he used as a warehouse, seizing inventories of magazines at both places. Mr. Rosenbloom, who had been released on bail after his first arrest, surrendered to the police upon hearing of the raids and was rearrested (A131).

Captain Ferguson's criteria for obscenity—"anytime the private parts is [sic] showing of the female or the private parts is [sic] shown of males"—had no relation to the proper constitutional standards (A258). So Mr. Rosenbloom was acquitted in May 1964, and the seized material was returned to him (A217, 224).

But long before his exoneration in criminal court, the media in Philadelphia had judged his case. Two series of radio broadcasts on Station WIP, which is managed and controlled by the respondent, are involved in this libel suit. The first series began with an announcement headlined "City Cracks Down on Smut Merchants" on the six o'clock

news for October 4, 1963 (A26). The broadcast stated (1) that the police had raided Mr. Rosenbloom's home; (2) that the police had confiscated a thousand magazines and arrested Mr. Rosenbloom on charges of possession of obscene literature; (3) that the police had also raided a barn rented by Mr. Rosenbloom and confiscated obscene books there; and (4) that Captain Ferguson believed the police had "hit the supply of the main distributor of obscene material in Philadelphia" (Plaintiff's Exhibit 1, A239, 350).

This newscast was repeated, with minor changes, during the remainder of the evening and again the next day (Plaintiff's Exhibits 2-8, A239, 352-68). The fact that Mr. Rosenbloom was arrested and his magazines seized was reported accurately, except for some confusion over addresses and the number of books (magazines, actually) confiscated (A119-26). In the initial newscasts, however, the station announced without qualification that the material seized in the second raid was obscene, assuming responsibility for this characterization, which Mr. Rosenbloom's later acquittal proved erroneous. In addition, Captain Ferguson's opinion that Mr. Rosenbloom was a major distributor of obscene material, variously reported by the station as a belief or a statement of fact by the officer, was wrong (*See, e.g.*, A350, 353, 356, 360).

The second series of newscasts, which were aired on October 21, October 25 and November 1, reported developments in a lawsuit Mr. Rosenbloom and the Outdoor American Publishing Company brought to enjoin further harassment and publicity by the police and the news media (Plaintiff's Exhibits 9-21, A239, 369-401). The complaint sought only to vindicate Mr. Rosenbloom's right to distribute the publisher's magazines, which they cor-

rectly asserted were constitutionally protected (Plaintiff's Exhibit 22, A239, 402-13). Station WIP, which was not a named defendant, repeatedly characterized the plaintiffs as "smut distributors" and "girlie book peddlers," and stated that they were attempting to force the defendants "to lay off the smut literature racket" (*See, e.g.*, A369, 376, 379, 380, 385, 390, 398).

At trial in this case, Mr. Rosenbloom testified that the broadcasts "put me out of business" (A171). Thirty-four of his 60 accounts "refused to do business with me" (A114). He was unable to obtain a single new account, although he solicited business from 81 prospective outlets in 51 towns or cities surrounding Philadelphia (A184). Many of his friends and relatives "haven't spoken to me since they heard about me on the radio" (A116). The effect of all this upon Mr. Rosenbloom, physically and psychologically, was scarcely surprising: "I couldn't sleep at night. I think I gained about 30 pounds inside of a month. I couldn't control my appetite or anything. I had just—well, I just was almost unfit to live with" (A171).

Mr. Rosenbloom also testified to an unsuccessful visit to Station WIP on October 27, 1963, four days before the final broadcast. When he asked to see or hear copies or tapes of the earlier news reports, the office receptionist allowed him to speak with Mr. Nate Wright, a part-time news broadcaster, on an intraoffice telephone. Mr. Wright played back one of the reports. When Mr. Rosenbloom asked if he was aware that his magazines were approved by the Supreme Court, Mr. Wright argued that the District Attorney said they were obscene. When Mr. Rosenbloom protested that the District Attorney had said publicly that his magazines were legal and not obscene (a

claim that the respondent did not challenge at the trial), Mr. Wright "just hung up" (A136-38).

District Court Proceedings

Mr. Rosenbloom brought this libel suit as a diversity action under 28 U.S.C. § 1332 in the District Court for the Eastern District of Pennsylvania. The case was tried before a jury in 1968. The trial judge rejected an instruction submitted by Metromedia based upon *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), on the ground that Mr. Rosenbloom "was in no sense a public man," and instead instructed the jury according to Pennsylvania law (A442). The trial judge refused to submit the question of special damages to the jury because there had not been an adequate showing that Mr. Rosenbloom's damages followed from the Station WIP broadcasts rather than from other media accounts and misaccounts.

The jury was charged that to return a verdict for general damages, they would have to find:

(1) That one or more broadcasts were defamatory in that they would tend "to so harm the reputation of the subject . . . as to lower him in the estimation of the community, or to deter third persons from dealing with or associating with him" (A323);

(2) That the defamatory statement(s) could reasonably be taken to have referred to the plaintiff (A324-25);

(3) That the station had violated its privilege "to report the news . . . so long as it does so fairly and accurately, and so long as that privilege was exercised reasonably and with reasonable care" (A326-27);

(4) That the statement was false (A328).

The jury was instructed that the plaintiff bore the burden of proof on all issues, including abuse of the privilege, except that the defendant had the burden of proving the truth of the assertions made (A340).

The jury was also instructed that in order to award punitive damages, it would need to find malice as that term was defined by Pennsylvania law; *i.e.*, "that these broadcasts were published with a bad motive or with reckless indifference to the rights of others" (A333).

The jury returned a verdict for Mr. Rosenbloom, awarding general damages of $25,000 and punitive damages of $725,000 (A343). The trial judge reduced the total verdict to $250,000 on remittitur, which Mr. Rosenbloom accepted (A457-59). Metromedia's motions in the alternative for judgment n.o.v. or a new trial were denied in a lengthy opinion by the trial judge, who held that the evidence was sufficient to justify an award of punitive damages (289 F. Supp. 737, A435-56).

The opinion stressed three factors which provided "sufficient evidence of a reckless disregard both of the truth of the defamatory assertions and the rights of the plaintiff" (289 F. Supp. at 745-56, A448). The first was Station WIP's refusal to allow Mr. Rosenbloom to present his side of the story when he visited its offices, which the trial judge equated with a refusal to retract or worse (289 F. Supp. at 746, A449-50). The second factor was the failure of Station WIP to investigate the truth of its charges. Particularly, the trial judge stressed the failure of Station WIP to examine either the court records or the magazines themselves before asserting in the second series of broadcasts that the plaintiffs were "girlie-book peddlers" at-

tempting to force the authorities to "lay off the smut literature racket" (289 F. Supp. at 746-47, A450-51). Finally, the trial judge found that the station's rude treatment of Mr. Rosenbloom and its failure to investigate were compounded by its inflammatory language which "smack[ed] of editorializing and a desire to create a sensation" (289 F. Supp. at 747, A451).

Appellate Proceedings

The Court of Appeals refused to attach controlling weight to the fact that Mr. Rosenbloom was not a public figure. In view of "the established public interest in the subject matter" of the broadcasts, the Court concluded that "proper accommodation between the First Amendment protections and the state law of defamation is found by requiring a plaintiff to meet the standard of proof formulated in *New York Times Co. v. Sullivan* . . ." (415 F. 2d at 896, A467).

The Court next decided that the record did not support a finding of "federal actual malice . . . so as to be a proper case for the jury." The Court considered and rejected individually each of the factors which the trial judge had found to indicate a "reckless disregard for the truth." It decided that the station representative's action in hanging up on Mr. Rosenbloom "amounted to little more than an argument or a difference of opinion," which was of little "value in considering the earlier broadcasts" (415 F. 2d 897, A469). The Court attributed the failure of the station to investigate to the fact that it "was reporting fresh news developments," without commenting upon the trial court's observation that the complaint in the law suit, at least, was on file at least a week before the beginning of

the second series of broadcasts (*Compare* 415 F. 2d at 897, A469 *with* 289 F. Supp. at 746-47, A450-51). As far as the repeated references to "smut distributors" and "girlie-book peddlers" were concerned, the Court could not "see how characterizing them as inflammatory tends to prove the requisite awareness of their probable falsity" (415 F. 2d at 898, A470).

Summary of Argument

The Court held in *New York Times Co. v. Sullivan*, 37 U.S. 254 (1964), that a "public official" must show "actu malice" in order to recover for defamation "relating to h official conduct." In subsequent decisions the Court ha extended the *New York Times* rule to libel suits by "publ figures" and has borrowed and applied the standard o actual malice in suits involving nondefamatory disclosure the discharge of public employees, and state libel proceed ings threatening national labor policy.

This case requires the Court to decide whether the ru of *New York Times* should be further broadened to appl generally to all libel suits. The plaintiff was a privat citizen in the strictest sense of the word before this co troversy. His arrest was newsworthy, but then so is vi tually anything the media choose to focus upon. Co sequently, if Mr. Rosenbloom must show actual malic then so must any private citizen suing for libel.

Application of the principles developed by this Cou in *New York Times* and subsequent libel cases, howeve demonstrates that Mr. Rosenbloom should not be require to prove actual malice. As a private citizen, his personali was not essential to public discussion of the newsworth events. He had no means to counterattack his critic and had not voluntarily assumed the risk of sharp publ criticism by pursuing a role of leadership in public affair

This suit differs markedly from every previous libel ca considered by the Court, and a new constitutional standa tailored to the needs of these facts is apropriate for lib suits by private citizens. The state-law standard of re sonable care applied by the trial court here meets the needs. Adequate criteria can be formulated to distinguis

private citizens from public figures. A standard of reasonable care promises sufficient certainty when applied to statements defamatory on their face to avoid the dangers of self-censorship by publishers, broadcasters and individuals who would speak out on public issues. Finally, the exercise of reasonable care can be ascertained by reference to objective facts reviewable by an appellate court.

Even if this Court should hold that the rule of *New York Times* must govern this suit, the Court of Appeals erred in overturning a jury verdict which in fact rested upon a finding of actual malice. The state-law definition of malice followed by the jury in awarding punitive damages was adequate to focus the jury's attention upon the proper inquiry—whether the radio station recklessly disregarded the truth. The failure of the trial judge to follow the precise language of *New York Times* should not require reversal in a suit tried before this Court has indicated that the actual-malice standard must apply to libel suits by purely private citizens.

Finally, the evidence here was sufficient to support the jury's finding of actual malice. The radio station not only failed to investigate the truth of its charges, but also refused to broadcast a retraction. It did so, moreover, despite its repeated use of inflamnatory language which should have warned the station that the exercise of a higher degree of care was reasonable.

ARGUMENT

I. The Principles This Court Found Decisive In New York Times And Succeeding Cases Neither Require Nor Justify An Extension Of The Requirement For A Showing Of "Actual Malice" To Suits For Defamation By A Private Citizen Who Is Not A Public Figure.

New York Times Co. v. Sullivan, 376 U.S. 254 (1964), ended a long era during which the law of defamation ignored our commitment to free speech. For the first time, this Court applied "the principle that debate on public issues should be uninhibited, robust and wide-open," *id.* at 270, to impose restraint upon a harsh law of strict liability that for centuries had punished critics of government for inadvertent misstatements of fact.[1]

The holding of *New York Times* that a "public official" must show "actual malice" to recover damages for defamation "relating to his official conduct," *id.* at 279, was purposefully narrow. But its reasoning, as commentators were swift to point out, was broad.[2] Subsequent decisions have explored its radiations. *Curtis Publishing Co. v. Butts*, 388

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[1] The late Professor Donnelly has provided the best recent discussion of the common law development of defamation in the English courts. *See* Donnelly, *History of Defamation*, 1949 WISC. L. REV. 99; *see also* Veeder, *History of Defamation I & II*, 3 COLUM. L. REV. 546 (1903), 4 COLUM. L. REV. 33 (1904); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 193-94; LEVY, THE LEGACY OF SUPPRESSION (1960).

[2] *See, e.g., Kalven, supra* note 1; *Pedrick, Freedom of the Press & the Law of Libel: The Modern Revised Translation*, 49 CORNELL L. Q. 581 (1964); *Note*, 67 COLUM. L. REV. 926 (1967), *Comment*, 75 YALE L. J. 642 (1966); *but cf. Note*, 51 *Va. L. Rev.* 106 (1965).

U.S. 130 (1967), applied the rule of *New York Times* to libel suits by "public figures." *Time, Inc. v. Hill*, 385 U.S. 374 (1967), borrowed the actual-malice requirement and applied it to a private citizen's suit claiming damages for a nondefamatory magazine story fictionalizing his experiences. Other decisions have borrowed the actual malice rubric where useful to meet the needs of particular circumstances. *See Pickering v. Board of Education*, 391 U.S. 563 (1968) (discharge of public employee); *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966) (state libel suit threatening conflict with national labor policy).

The Court must decide in this case whether the rule announced in *New York Times* should be broadly applied to all libel cases. Mr. Rosenbloom was in every sense a private citizen before the Philadelphia media chose to spotlight him, erroneously, as a "smut distributor" and "girlie-book peddler." The public had no more and no less "interest" or curiosity in Mr. Rosebloom than in any other private citizen involuntarily made "newsworthy." If the *New York Times* standard applies to his suit for defamation merely because his arrest was "newsworthy," it must apply to every libel suit. For experience demonstrates that the media, not the courts, determine who and what is "newsworthy."[3] Since public curiosity is boundless, particularly when skillfully stimulated, so is the concept of "newsworthiness." Virtually any event in a man's life may sur-

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[3] *See*, e.g., Kalven, *The Reasonable Man & the First Amendment: Hill, Butts, & Walker*, 1967 SUP. CT. REV. 267, 283-84; Kalven, *Privacy in Tort Law: Were Warren & Brandeis Wrong?* 31 LAW & CONTEMP. PROB. 326, 336-38 (1966).

face, long after the fact, as "newsworthy."[4] The mere fact of publication demonstrates the publisher's belief that his audience will be "interested," and satisfies the test of "newsworthiness" for practical purposes.

But the Court need not and should not extend *New York Times* to Mr. Rosenbloom and all the ordinary citizens like him who may be defamed. Neither the principles found controlling in earlier libel cases nor the practical necessities of implementing these principles indicate that "actual malice" should be a rule of general applicability, overriding all existing state libel law. To the contrary, analysis of *New York Times* and succeeding decisions demonstrates that a more refined constitutional standard responsive to First Amendment values can be articulated and administered for libel suits by anonymous citizens.

A. The principles applicable to libel suits.

The *New York Times* case offered an ideal occasion to begin tailoring private tort law to constitutional principles of free expression. The full page advertisement found offensive there by the Alabama courts accused the police and the local community of mistreating the late Dr. Martin Luther King and Negro students active in the civil-rights struggle. The plaintiff Sullivan, the police commissioner of Montgomery, Alabama, had recovered a judgment for

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[4] For this reason, an extension of the actual malice rule to libel suits by private citizens would effectively require reversal of the New Hampshire libel case also before the Court, where the jury was allowed to return a verdict for the plaintiff without a finding of "actual malice" if it found that the allegation that a political candidate was a former "bootlegger" during Prohibition constituted a "purely private libel." *Monitor Patriot Co. v. Roy*, No. 891 *cert. granted* February 24, 1970. For if a plaintiff need not be a "public figure" to encounter the actual malice requirement, it is difficult to see how the fact that the libel was unrelated to his candidacy could be relevant.

$500,000. The suit thus punished the *Times* for publishing a criticism of government—and allegedly of a particular government official[5]—and this Court accordingly analogized it to a criminal conviction for seditious libel. 376 U.S. at 273-76.

This analysis in terms of seditious libel—together with the Court's conclusion that regardless of whether the Sedition Act of 1798 was consistent with the Founding Fathers' concept of the First Amendment, "the attack upon its validity has carried the day in the court of history," *id.* at 276—was sufficient to require reversal of the Alabama judgment. But the Court went on to elaborate two additional reasons to protect the advertisement involved. First, the plaintiff as a government official enjoyed a privilege under orthodox libel law to counterattack his detractors. The court discussed *Barr v. Matteo*, 360 U.S. 564 (1959), which dealt with federal officials, but also referred to state law. *See* 376 U.S. at 282 and n.22. Second, the Court pointed out that government officials, by voluntarily accepting the role of public leadership, deserve to be treated like judges as "men of fortitude, able to thrive in a hardy climate." *Id.* at 273, citing *Craig v. Harney*, 331 U.S. 367, 376 (1947).

Government officials are obviously not the only men who enjoy a platform to counterattack their critics, and who have voluntarily chosen to expose themselves to the vigorous, even vicious, debate that surrounds public affairs. *New York Times* accordingly contained far broader implications than its narrow holding, which soon emerged in

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[5] The Court held as an alternative ground for reversal that the evidence was constitutionally insufficient to support the jury's finding "that the allegedly libelous statements were made 'of and concerning' the respondent" Sullivan. 376 U.S. at 288.

succeeding cases. Although *Time, Inc. v. Hill*, 385 U.S. 374 (1947), was decided slightly before *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, 388 U.S. 130 (1967), the opinions in the latter two libel cases, which were decided together, are best examined first.

Butts and *Walker* involved, respectively, a libel suit by the athletic director of a state university against a magazine that had accused him of fixing a football game and a libel suit by a retired Army general against a news service that had reported his leadership of a desegregation riot at the University of Mississippi. All the Justices agreed that the plaintiffs were "public figures" and that some measure of constitutional protection was demanded for utterances directed at them. The Court split, however, on the issue of how much protection. Chief Justice Warren spoke for the majority in applying the actual-malice standard of *New York Times*. 388 U.S. at 162-65. Mr. Justice Harlan, joined by three other Justices, argued for a constitutional standard of essentially gross negligence. *Id.* at 155.

Both the Chief Justice and Justice Harlan relied heavily upon the proposition that the plaintiffs, because of their position, could or should surrender some portion of the protection that private tort law would otherwise promise them. Both opinions reasoned that the public's "independent" interest in the plaintiffs allowed them to counter the charges made against them with the expectation that their version of events would receive media coverage similar to the original accounts. 388 U.S. at 154, 164.[6] Thus, Gen-

[6] Thus, Justice Harlan stressed the plaintiffs' "means of self-defense" in light of the fact that "both Butts and Walker commanded a substantial amount of independent public interest at the time of the publications." 388 U.S. at 154. Chief Justice Warren defined "public figures" as those "who do not hold public office at the moment [but] are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large," and went on to reason that "surely as a class these 'public figures' have as ready access as 'public officials' to mass media of communication, both to influence policy and to counter criticism of their views and activities." *Id.* at 164.

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eral Walker had resigned his commission to pursue his political beliefs full time after a much publicized incident involving his indoctrination of troops overseas. Wally Butts, like the other principal in the alleged fix, Bear Bryant of Alabama, was a folk hero in the South.

A desegregation riot or a football fix is, of course, an important event in and of itself. But the public was peculiarly fascinated, as the media recognized, by the allegation that General Walker had led the charge at Mississippi, and that Wally Butts had sold out his boys. Since the public interest was piqued more by the men than by the events, the media predictably would be pleased to prolong the news value of the stories by publishing their denials.

In addition, Justice Harlan elaborated the assumption-of-the-risk theory touched upon in *New York Times* and suggested again in *Rosenblatt v. Baer*, 383 U.S. 75, 86 n.12 (1966). The reasoning that General Walker had "by his purposeful activity . . . thrust . . . his personality into the 'vortex' of an important public controversy," 388 U.S. at 155, recognizes that an actor who voluntarily struts upon the public stage must expect brickbats as well as bouquets. The same is true of football coaches. The glamor of association with a big-time athletic program carries with it the pressure to produce a winning team—and a coach must realize that harsh speculations may follow a loss.

Finally, Chief Justice Warren rejected the argument that the *New York Times* rule could be limited to criticism of government by stressing the uncertain line between governmental and nongovernmental functions and institutions in modern life. *Id.* at 165. This reasoning has both a conceptual and a practical basis. Protection for critics of government may lie at the core of the First Amendment. But citizens must know many other things to exercise their

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sovereignty meaningfully.[7] And, even if a distinction between governmental and nongovernmental functions could be conceptually justified, the distinction is too elusive for reliable application. The risk is too great that protection will, in a particular case, be erroneously denied because of a failure to measure correctly the proximity of a "governmental" interest.

B. The principles applicable to suits for nondefamatory disclosures.

At first glance, the intervening decision in *Time, Inc. v. Hill*, 385 U.S. 374 (1967), seems inconsistent with the reasoning of *New York Times* and *Butts*. The plaintiff there sued *Life Magazine* under a New York statute for a story that pretended to depict, but in important respects fictionalized, his family's experiences while held hostage by escaped convicts. This Court concluded that Mr. Hill should be required to prove that the nondefamatory falsehoods—actually, fictionalizations—were the product of actual malice, although (1) the subject matter of the story in no way remotely touched governmental interests; (2) the public had no "independent" interest in Mr. Hill which would encourage the media to publicize his version of the

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[7] This reasoning reflects the thinking of Dr. Meiklejohn, which has been consistently urged upon the Court in *New York Times* and succeeding cases, *see Note*, 67 COLUM. L. REV. 926, 938-42 (1967). Dr. Meiklejohn's principal works relevant to this problem are Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, and *Meiklejohn, Political Freedom* (1960) (containing his earlier book, *Free Speech and its Relation to Self-Government* (1948)). Mr. Justice Brennan has suggested that Dr. Meiklejohn might have approved the decision in *New York Times*. Brennan, *The Supreme Court & the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 18-19 (1965). Dr. Meiklejohn, in fact, went further in commenting upon the case: "It is," he said, "an occasion for dancing in the streets." Kalven, *supra* note 1, at 221 n. 125.

incident; and (3) Mr. Hill and his family had in no way voluntarily thrust themselves into the vortex of public affairs.

But *Time v. Hill* conflicts with *New York Times* and *Butts* only if one begins with the premise that a single analytic framework should suffice for all private tort cases. Of course, all private suits touching speech must, after *New York Times*, meet First Amendment scrutiny. And the fact that this Court applied a standard initially formulated in a libel case to a suit involving a different cause of action in *Time v. Hill* may have encouraged the Court of Appeals here to conclude that the same analysis applies whatever the cause of action, and consequently that a result reached in one tort suit can be applied to any other tort suit involving a plaintiff similarly situated.

Such an uncritical reading of *Time v. Hill* ignores this Court's repeated caveats that defamation was not involved there, and that different considerations would be presented if it were. 385 U.S. at 384 n.9, 390-91. The subsequent decision in *Butts* demonstrates that the Court meant what it said. For if a decision that requires a private citizen to show actual malice in a suit for nondefamatory disclosure applied without further analysis to any tort suit by a private citizen, the Court would not have needed to pause over whether General Walker and Coach Butts were "public figures," let alone over the question of what standard should govern their suits.

Butts and *Walker* required several long opinions, despite the earlier decision in *Time v. Hill*, because the nature of the cause of action asserted represents an important factor in determining the appropriate constitutional standard to protect free debate. And nothing better demonstrates this truth than the difference between a claim for defamation

and the strange cause of action presented to the Court in *Time v. Hill.*

The law of defamation protects a man's reputation—an objective value, injury to which can be determined, as it was in this case, by reference to community standards. Its history is long. The local courts of England afforded redress for slander in the thirteenth century, long before the development of modern concepts of libel and seditious libel in the seventeenth century.[8] Defamation laws has traced a tortured and confused path over the centuries. But the tenacity of its harsh doctrines despite scholarly criticism must reflect a realization by courts and the community that reputation is both precious and protectable.

Time v. Hill, on the other hand, is commonly described as an "invasion of privacy" suit. Were it that and nothing more, the cause of action would be different enough from defamation. The "right to privacy," as a matter of private tort law, is famous as the cause of action created by a law review article.[9] In pristine form, it protects in Judge Cooley's phrase the "right to be let alone." [10] The values thus guarded, while real, are subjective in the extreme. The monetary equivalent of a tarnished reputation may be diffi-

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[8] "Defamation was one of the most common torts brought before the local courts in the Middle Ages. Shame was keenly felt and courts gave the offense a generous scope. In almost every action before a local court in the thirteenth century, the plaintiff will claim compensation, not only for damage . . . but also for the shame. . . ." Donnelly, *supra* note 1, at 100-01. The royal courts did not generally assert jurisdiction until much later, but Donnelly reports one case decided in 1265. *Id.* at 106-07. Seditious libel enjoyed its heyday during the seventeenth century in the Star Chamber as part of the general effort to regulate the printing press. *Id.* at 116-19. The earliest traces of seditious libel as an offense can be found in the series of statutes beginning in 1275 which punished *scandalum magnatum* (slander of magnates). *Id.* at 108.

[9] Warren & Brandeis, *The Right to Privacy,* 4 HARV. L. REV. 193 (1890).

[10] *Cooley,* LAW OF TORTS 29 (2d ed. 1888).

cult to calculate, but the hurt itself is clear. The test commonly employed for defamation—that the statement tends to lower the subject in the eyes of the community—reveals that the insult required is one appreciated and understood as such by the rest of the community.

Where one can justly ask "to be let alone," however, is anything but a matter of community consensus except in the most intimate areas of life. In many, if not most activities, one man may cherish the spotlight, another may ignore it, another may mildly shun it, and the rare man may agonize under the glare of publicity. This is not to say that no interest exists in being "let alone," but simply that its shifting, elusive quality makes its effective protection difficult.[11]

Moreover, the cause of action for "invasion of privacy" has accumulated almost as tangled a history in the 80 years since Warren and Brandeis published their article as libel law has acquired over more than eight centuries.[12] Thus, the public's "right to know" creates an obvious tension with the individual's "right to be let alone," with the result that many jurisdictions have carved an exception for reports about "newsworthy" people or events. And since "newsworthiness" as a practical matter is defined by the press and not by the courts, the result has been to create an

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[11] Thus, Professors Harper and James have struggled with "the delicacy of the problems raised and the difficulty of drawing the nice line which separates what the individual may keep to himself and what the public is entitled to know about him." HARPER & JAMES, LAW OF TORTS § 9.7, p. 690 (1956).

[12] *See generally*, Kalven, *Privacy in Tort Law—Were Warren & Brandeis Wrong*, 31 LAW & CONTEMP. PROB. 326 (1966); Wade, *Defamation & the Right of Privacy* 15 VAND. L. REV. 1093 (1962); Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

exception that virtually swallows the original cause of action.[13]

To prevent its total disappearance, state law has sometimes carved an exception to the exception whereby the privilege for truthful reports of newsworthy matters disappears if events are "fictionalized" or distorted.[14] In this form, invasion of privacy may seem to closely approach defamation as a cause of action, in that both require falsity. But to sue successfully under the "false light" offshoot of invasion of privacy, the plaintiff must show *only* falsehood. Unlike a suit for defamation, he need not show that the statement has injured his reputation. Indeed, a quite flattering portrayal to the community, if false or fictionalized, may create liability under this doctrine. When this happens, it is oftentimes difficult to perceive just why the plaintiff feels injured, or how the falsity contributed to that injury.

The path of invasion of privacy as a cause of action in New York State demonstrates this problem, with an additional wrinkle. The added complication is that while the New York statute is captioned the "Right of Privacy," its text refers to the unauthorized use of a person's name or likeness "for advertising purposes," and the background of the statute suggests that its goal was to protect private

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[13] *See* note 3 *supra.*

[14] Dean Prosser finds four separate torts huddled under the privacy tent. *See Prosser,* LAW OF TORTS § 112, pp. 832-42 (1964). "Public Disclosure of Private Facts" corresponds roughly to the "pure" form of invasion of privacy described here. "False Light in the Public Eye" corresponds to the "fictionalization" variant described here. "Appropriation" is the use of a person's name or likeness for commercial purposes without his consent, and may root more in the plaintiff's desire for compensation than for privacy. "Intrusion" causes injury not by disclosure but rather by the simple fact that a private part of life has been observed or overheard.

citizens from having the commercial value of their name or likeness appropriated without compensation.[15] The New York courts had interpreted the statute more broadly before *Time v. Hill*, however. They had also recognized the "newsworthy" privilege, and the "false light" exception to that privilege.

As matters stood when *Time v. Hill* arose, therefore, the New York statute served a variety of purposes in a variety of strange ways. It protected a person's property right in his own name or likeness, but, because of the "newsworthy" privilege, only if the unauthorized use "fictionalized" his life or presented him in a "false light." *See, e.g., Spahn v. Julian Messner, Inc.*, 18 N.Y. 2d 324, 221 N.E.2d 543 (1966).

The statute also protected the right of a citizen who did not wish to profit from his fame simply to be left alone. The Hill family, for example, did not wish to exploit the commercial opportunities created by the public's curiosity about their experiences. They wanted simply to forget the incident, and go on with their private lives—even going so far as to move to a new home in a new community to pursue this goal. When *Life Magazine* published the story which in part fictionalized their ordeal, Mr. Hill and his family felt injured because of the renewed publicity, rather than because of the fictionalized aspects of the story—which portrayed the Hills rather more heroically than was the case, in any event.

As a consequence, reasonable men could differ concerning the degree of judicial protection to which the plain-

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[15] This represents the third of Dean Prosser's privacy torts, that of "Appropriation." For a succinct description of New York law, *see Note*, 67 COLUM. L. REV. 926, 933-34 (1967).

tiffs should be entitled. Since the New York statute created a cause of action only erratically—when the defendant fictionalized or falsified a story in some respects, and not necessarily in any respect that contributed to the plaintiff's sense of injury—this Court quite justifiably concluded that, at the very least, the falsehood or fictionalization should be associated with some real culpability on the part of the defendant. If defendant had proceeded recklessly—*i.e.*, with actual malice—then there was no reason to protect him from liability, however strange and illogical the cause of action recognized under state law.

The majority opinion by Mr. Justice Brennan reflected this analysis. While it carefully tracked out the distinction between a pure invasion of privacy suit and the latter day "false light" offshoot created by New York law, the opinion viewed such suits in general and Mr. Hill's suit in particular as actions bottomed in publicity rather than falsehood. Thus, in distinguishing between libel suits and privacy suits, and emphasizing that its decision applied only to the latter, the Court reasoned:

> "All libel cases concern public exposure by false matter, but the primary hurt being compensated is damage to reputation. In the 'right of privacy' cases, the primary damage is the mental distress from having been exposed to public view, although injury to reputation may be an element bearing upon such damages." *Id.* at 385 n. 9.

And in explaining why Mr. Hill should be required to surmount the barrier of demonstrating actual malice in order to recover under the New York statute, the majority clearly viewed the issue as involving publicity rather than falsehood:

> "Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this

exposure is an essential incident of life in a society which places a primary value on freedom of speech and of the press." *Id.* at 388.

This reasoning is compelling when mere publicity is involved. It loses its force, however, when defamation is considered. Exposure of one's reputation to damaging, defamatory calumny should not be a "concomitant of life in a civilized community." The injury is clearer, less justifiable, and more susceptible to judicial redress.

C. The need for a new constitutional standard for libel suits by a private citizen.

The preceding discussion has shown that (1) in *New York Times* and *Butts* the Court has analyzed libel cases within a framework which recognizes both the importance of "uninhibited, robust and wide-open" public debate and the plaintiff's "prior activities and means of self-defense;" and (2) the Court has followed a quite different analysis in suits for nondefamatory publicity which focuses upon the peculiar nature of the plaintiff's cause of action rather than his prior activities.

The jury awarded Mr. Rosenbloom damages for defamation, not for any disclosure of his private affairs. In deciding whether that verdict should be overturned, the analysis of *New York Times* and *Butts*, rather than *Time v. Hill*, is accordingly appropriate. By that calculus, Mr. Rosenbloom presents a quite different case for this Court than did Police Commissioner Sullivan, General Walker or Coach Butts. He was an anonymous citizen, attempting to launch his own business, when the police began their raids. The news story, and there undoubtedly was a story, was that the police were beginning a crackdown, and twenty-nine arrests

had been made. There is no indication why Station WIP singled out Mr. Rosenbloom by name, except that Captain Ferguson apparently decided, for whatever reason, that he was a major distributor of pornographic literature.

The irrelevancy of Mr. Rosenbloom to the story as a personality is shown by Station WIP's total lack of interest in him. There is no indication that the station attempted to contact him at the time of the arrest. When he protested the later broadcasts, a station representative hung up. General Walker and Coach Butts, in contrast, had deliberately chosen the public spotlight. The stories involving them would have been meaningless without a description of them and their roles—like playing Hamlet without Hamlet. And since they were the protagonists of their respective dramas, they could defend themselves and counterattack their critics.

In short, this case is realms removed in all relevant respects from *New York Times* and *Butts*. Not only was Mr. Rosenbloom so far removed from government office or even a role in public affairs that no danger of punishment for seditious libel could infect the jury's verdict, but a full discussion of the newsworthy events did not justify, let alone require, the defamatory destruction of his reputation. He had not by his "prior activities" sought public fame nor voluntarily assumed the risk of public defamation. And he had not the slightest "means of self-defense."

The Court has in the years since *New York Times v. Sullivan* formulated and applied rules which regulate activities presenting First Amendment issues with a sharp eye for the parties involved and the facts surrounding their exercise of free speech. For example, in regulating employer speeches during union organizing campaigns, the Court

requires that communications be "carefully phrased on the basis of objective fact" to avoid any "threat of reprisal or force or promise of benefit." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617-18 (1969).

The Court has also concluded that states may properly apply a stricter test for obscenity to protect younger readers. *Ginsberg v. New York*, 390 U.S. 629 (1968). And in accepting this variable standard for obscenity, the Court approved a state statute under which criminal liability hinged upon whether the defendant had "made a reasonable bona fide attempt to ascertain the true age" of a magazine purchaser. *See id.* at 645, 646.

The importance of opportunities for counterspeech has been underscored in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). Because only a limited number of stations can broadcast at once, the Federal Communications Commission has a fairness doctrine which requires broadcasters to offer reply time to victims of personal attacks and to persons differing with station editorials. Despite forceful arguments that this doctrine will discourage stations from broadcasting controversial material, because of the scheduling difficulty and cost of providing reply time, this Court approved the fairness doctrine in *Red Lion*. The core of that decision is the recognition that "the purpose of the First Amendment to preserve an uninhibited marketplace of ideas" is best served by rules that strive for a fair presentation of both sides of an issue, even if those rules entail some risk that broadcasters will avoid controversial material. *See id.* at 390-93. The Court stressed that its constitutional analysis proceeded from the evidence then available to it. "If the experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of

coverage, there will be time enough to reconsider the constitutional implications." *Id.* at 393.

This case does not involve employer coercion, obscenity or the fairness doctrine.[16] But the approach followed by the Court in protecting First Amendment values in those areas is relevant here. The decisions just discussed do not tolerate suppression of speech. They do recognize that the "breathing space" needed for First Amendment values depends upon the facts of each situation, and that particularized constitutional standards can and should be fashioned accordingly. The unique problems presented by libel suits involving private citizens involuntarily swept up in public controversy deserves the same treatment.

The critical question is what constitutional standard will protect public debate here. We believe that the Pennsylvania law applied in this case provides an answer. The trial court charged the jury that "a news medium has a right to comment upon the news and to report the news. . . . so long as there is no intention to injure the plaintiff personally, and so long as that privilege is exercised reasonably and with reasonable care" (A 326). This charge properly stated Pennsylvania law. *Purcell v. Westinghouse Broadcasting Co.*, 411 Pa. 167, 191 A.2d 662 (1963); *see also Montgomery v. Dennison*, 363 Pa. 255, 69 A.2d 520 (1949).

Purcell represents a careful attempt by the Pennsylvania Supreme Court to protect public debate in a case present-

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[16] Even if the fairness doctrine applied to news broadcasts, Station WIP failed to notify Mr. Rosenbloom of its attack and in fact rejected his plea for fair treatment when he visited the station to protest. *See Red Lion*, 395 U.S. at 372. Station WIP can therefore scarcely advance the doctrine as defense to this suit or as a justification for privilege—if indeed the fairness doctrine should, if applicable and complied with, offer a broadcaster as a regulated firm greater latitude for libel.

ing facts remarkedly similar to this suit. A radio station there had broadcast a documentary story concerning an alleged racket in the towing of cars. The plaintiff, like Mr. Rosenbloom, was an anonymous citizen the radio station seized upon to dramatize its story. In holding that the station should be liable because of its failure to exercise reasonable care to determine the facts, the court distinguished reports concerning famous figures from the needless, defamatory spotlighting of anonymous citizens:

> "The highlighting of Purcell in the broadcast could not be attributed to his being a person of public importance or even one at all known to the general public. In the vast panorama of the population of the metropolitan city of Philadelphia he was only a blur in the picture. This blur [the station] proceeded to enlarge under the magnifying glass of exaggeration, it was then sharpened with a pencil and keen knife of purpose, colored to meet the design of the defendant, until what was a gray, meaningless dot of anonymity became the portrait of an enemy of society, a 'mug,' a 'racketeer,' a criminal." 411 Pa. at 179, 191 A. 2d at 668.

In determining whether a standard of reasonable care, rather than the actual-malice requirement of *New York Times*, is appropriate for this case, the Court must consider three questions: (1) whether adequate criteria can be formulated to distinguish cases in which a reasonable care standard will be appropriate from those requiring application of the *New York Times* rule; (2) whether a standard of reasonable care has sufficient certainty in experience to protect defendants and avoid the dangers of self-censorship; and (3) whether the exercise of reasonable care can be determined by objective facts susceptible to review, as all factual determination freighted with constitutional overtones must be reviewed, by appellate courts.

The answer for the first question can be fashioned from the distinction suggested in *Butts* between libel suits by public figures and libel suits by anonymous citizens. There are sound reasons for requiring a stricter standard in the former case: because of the "independent" public interest in such figures, their personalities are essential to any discussion of public affairs; their stature allows them to respond effectively to criticism; finally, they have voluntarily thrust their personalities into public debate. None of these considerations apply to anonymous citizens generally, or to Mr. Rosenbloom in particular.

The line between public figures and anonymous citizens is not impossible to draw. The test suggested by *Butts* is whether the public had an "independent" interest in the person before the controversy began. *See* 388 U.S. at 154; *cf. id.* at 164. The Court can insist upon rigorous criteria for anonymity, which will nevertheless protect millions of private citizens, the vast majority of the population. This will be true even if the Court considers a public figure everyone whose name has figured in public discussion or a published report over the longest period during which his personality might have remained in the public consciousness. It will still be true even if the Court, in addition, considers that anyone who has "participated in public debate on an issue of grave public concern," *Pauling v. News Syndicate*, 335 F.2d 659, 671 (2d Cir. 1964) (per Friendly, C.J.), or attempted to "shape events in areas of concern to society at large," 388 U.S. at 164, has thereby become a public figure.

The Court may look to the common law of defamation as well as to common sense in order to distinguish public figures from anonymous citizens. The fair comment rule is constitutionally inadequate because it fails to protect mis-

statements of fact, as opposed to comment upon disclosed facts. But court determinations and commentators' analyses of the scope of the rule offer a useful body of experience in determining criteria for who is a public figure.

The usual shorthand statement of the rule is that it protects comment upon "matters of legitimate public interest." *See Harper & James, Law of Torts*, § 5.28, p. 456 (1956). The adjective "legitimate," however, conceals the essential question. As Judge Leventhal has pointed out in a careful opinion distinguishing the wide sweep of the "newsworthy" privilege in invasion-of-privacy suits from the narrower scope of the fair comment rule,

> "The touchstone [in determining the applicability of the fair comment rule] is not whether the public is interested in [the] plaintiff's views or conduct, for presumptively that applies to everything in a newspaper."
> *Afro-American Publishing Co. v. Jaffe*, 366 F. 2d 649, 657 (D.C. Cir. 1966).

The courts have generally meant more by the phrase "matters of legitimate public interest" than "matters of mere public curiosity." *See, e.g., Note*, 67 *Colum. L. Rev.* 926, 948 & n. 159 (1967); *Developments in the Law: Defamation*, 69 *Harv. L. Rev.* 875, 925-27 (1956). The occasional confusion in decisions implying the contrary has arisen from the ambiguity of the word "interest." The public is "interested" in anything about which it is curious, but it has an "interest" only in certain matters which directly affect it. The customary reliance upon the modifier "legitimate" signifies that the fair comment rule, unlike the law of invasion of privacy, travels on this restricted meaning of "interest."

Thus, the Restatement of Torts and the leading tort commentators analyze the fair comment rule under the head-

ings of discussions of public officers and candidates, public institutions, and voluntary offerings to the public of objects of art and science. *See generally Restatement of Torts*, §§ 606-10; *Harper & James, Law of Torts*, § 5.28 (1956); *Prosser, Law of Torts*, § 110, pp. 812-16 (1964); *cf. Newell, Slander & Libel*, §§ 477-504 (1924). The public "interest" in officers and candidates for office is clear. Similarly, public institutions have been defined to include not only schools and hospitals, but private enterprises which "affect the general interest of the community." *Prosser, Torts*, p. 813. And men involved with public institutions may accordingly become, in some circumstances, public figures.

The law dealing with offerings to the public is particularly important in seeking criteria to determine who is a public figure. The privilege of comment allows vigorous criticism of anything offered up for public judgment–a play, a novel, an invention or a product. But the rule allows criticism of the person who makes the offering only to the extent that his personality and motivations are relevant to an evaluation of the product. *See Harper & James, Torts*, p. 461; *Restatement of Torts* § 609, Comment (c).[17] This distinction, and it has proved a workable distinction, has allowed the courts to protect debate upon objects and persons in the public domain, while discouraging needless and irrelevant defamation of private reputations.

A careful examination of the established boundaries of the fair comment rule shows that Mr. Rosenbloom, an anonymous citizen by the test of common sense, was also

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[17] This rule of relevancy places "purely private libels" outside the scope of the fair comment doctrine. See HARPER & JAMES, TORTS § 5.28, p. 460; *cf. note* 4 *supra*.

not a public figure if that term is defined by reference to the fair comment rule. He was not a crusader for nudist magazines, let alone for smut. As the record indicates, Mr. Rosenbloom did not want to offer anything controversial to the public, simply to earn a living. Having helped place the magazines on the market, even if only as a middleman, he would have had no complaint had Station WIP broadcast an editorial saying that these magazines, while legal, were offensive to the station management and, it thought, to the bulk of the community. But to air that viewpoint, the station would scarcely need to or be justified in vilifying Mr. Rosenbloom, as it in fact did. He had not offered his personality and motives for criticism, either directly or as a necessary corollary of distributing his magazines.[18]

As for the second question, a standard of reasonable care for libel suits by anonymous citizens offers sufficient certainty to avoid any danger of self-censorship by publishers. As a general matter, reasonable care is a familiar standard in tort law, which this Court has applied in resolving constitutional problems, including those of the First Amendment. *See Ginsberg v. New York;* 390 U.S. 629, 645, 646 (1968) (discussed *supra*).

The Court rejected a negligence standard in *Time v. Hill* because "negligence would be a most elusive standard, especially when the content of the speech itself affords no warning of prospective harm to another through falsity." 385 U.S. at 389. That reasoning is cogent when nondefamatory publicity is involved—for in most matters, who can say what disclosure a given plaintiff will find objectionable. But that consideration has no force where utterances are

[18] Several weeks after the police arrests, and the ensuing media attacks upon his reputation, Mr. Rosenbloom initiated a lawsuit to prevent such harassment and publicity. It would, of course, be a cruel hoax if his defamers could point to this effort toward self-defense to justify both the original and further defamation.

defamatory on their face. If an exception is granted for the rare cases of extrinsic libel where the statement carries no warning of injury upon its face, (*e.g.*, a newspaper reports the birth of twins, without realizing that the couple has been married only a month), a rule requiring reasonable care in private citizens' libel suits would not threaten defendants with surprise.

The fact that tort law has found reasonable care a workable standard generally does not end the inquiry. The particular problems of public debate in the broadcasting and publishing industries must be examined to determine whether the standard is workable there. This concrete inquiry can be pursued along with the third relevant question, whether reasonable care can be determined by reference to objective facts reviewable by an appellate court. There are dangers at both extremes here—either from a total want of objective criteria, or from such a rash of conflicting evidence of care that judgment becomes erratic. But in fact the analysis is workable, both for publishers beforehand and courts exercising hindsight. This is best demonstrated by examining the facts of this case.

A test of reasonable care involves two inquiries—how much care was exercised, and how much care would be reasonable under the circumstances. As to the first, the initial question is what investigation was made to determine the facts. The record here indicates that Captain Ferguson spontaneously reported his raids to Station WIP. A station representative at trial could not recall having previously received any false reports from Captain Ferguson; he did not, on the other hand, testify that Captain Ferguson was known to the station or had provided reliable evidence before (A 293-94). The defendant did not introduce evidence of any attempt to investigate the accuracy of Captain

Ferguson's report, and its representative could not recall any investigation when questioned by plaintiff's counsel (A 33). As far as its news reports concerning the lawsuit are concerned, the station representative suggested that the station generally had contacts at the courthouse, but refused to be more specific (A 55-56; 72). So, as far as the plaintiff could determine at trial, Station WIP broadcast the reports upon the basis of an unsolicited report from a police officer unknown to the station, and on the unsubstantiated strength of unspecified tips from some unidentified person at the courthouse.

When the defendant is a broadcasting company, a second factor in determining the exercise of care is the steps by which incoming reports and investigations of those reports (if any) are translated into broadcast copy. The record here shows that individual newscasters at Station WIP normally write their own copy, exercising their own judgment as to what is newsworthy and how it should be phrased (A 15-17; 59-61). Upon occasion, the news is broadcast by different members of the news department than write the copy (A 45, 73). In addition, newscasters frequently rework material to change its language and keep a story fresh (A 44, 67, 69, 70). These ad hoc procedures allow individual newscasters considerable leeway to spice up reports, as happened here. The record does not indicate that anyone outside the Station WIP newsroom described Mr. Rosenbloom as a "girlie book peddler" at the time he initiated his lawsuit, or characterized that suit as attempting to force the authorities to "lay off the smut literature racket."

A final indication of the exercise of care is the willingness of a defendant to correct earlier broadcasts in light of later information. Here, of course, the station representative's

response when Mr. Rosenbloom protested the broadcasts and offered to demonstrate their error was to hang up.

In determining how much care would be reasonable, there are again several factors. First, how timely was the material published? If "hot news" is involved, the time for investigation is limited, and no checking may be possible. *Cf. Butts,* 388 U.S. at 157. News flashes therefore often prove unreliable—consider, for example, the confusion created by the first reports of Pearl Harbor, or the assassination of President Kennedy or Robert Kennedy. For that very reason, "news bulletins" are often identified as such. But however "hot news" should be handled, that issue is irrelevant here. The first broadcast concerning Mr. Rosenbloom's lawsuit was aired at least a week after his complaint was filed. Station WIP scarcely had suddenly breaking news on its hands.

A second important factor in determining how much care is reasonable is the nature of the defendant and its operations. A private individual speaking out on a public issue normally has few if any investigatory resources, does not make a profession of separating fact from fiction, and does not represent himself to his audience as an authority. Newspapers and radio stations, at the other end of the spectrum, publish or broadcast the news every day. They have professional staffs who make the collection and evaluation of news their business, and who are held out to the public as experts (A 10). The station's product is advertised as the "news," and the public has certain expectations concerning the preparation that goes into the news, and attaches weight to it accordingly.

The nature of the utterance is a final determinant of how much care is reasonable. Thus, the fact that a broadcast uses inflammatory language, as was the case here,

may not be indicative of what defendant's state of mind was. But it is relevant in determining what the defendant's state of mind should have been. When serious charges are repeatedly made against a private citizen with no means to reply, it is "reasonable" to expect a higher degree of care than when a news broadcast concerning an event of the day tangentially may brush the reputation of someone indirectly involved.

In short, the evidence in this case demonstrates that Station WIP exercised minimal care—it would not stretch the facts to say no care—in circumstances under which the relative staleness of the news, the position and expertise of the defendant, and the nature of the accusations all permitted and demanded some care for the truth of the broadcasts made.

More important, this analysis of the present case demonstrates that determinations of reasonable care can be cast in a framework which looks toward a limited number of objective facts, susceptible to evaluation by possible defendants before defaming anonymous citizens, and susceptible to review by appellate courts after the event.

II. The Jury In Assessing Punitive Damages Found Upon Adequate Instructions And Sufficient Evidence That Station WIP Acted With Reckless Disregard For The Truth In Defaming Mr. Rosenbloom.

We have argued that the actual malice requirement should not be applied to all libel suits, and that the Pennsylvania standard of reasonable care provides a workable rule for suits by private citizens that will provide "breathing space" for First Amendment values. This Court may disagree. If so, the Court of Appeals nevertheless erred

in overturning a jury verdict which rested upon a finding of malice.

The issue hinges upon the adequacy of the instructions to the jury, and the sufficiency of the evidence to support their verdict. The trial judge declined to instruct the jury in the exact language of *New York Times*. But the jury was charged that to award punitive damages it would need to find "malice," which the trial judge defined under state law as "a bad motive or malice toward the plaintiff, or if you find that it was published with reckless indifference to truth" (A 333). Elaborating, the trial judge went on to charge the jury that punitive damages:

> "really are awarded for outrageous conduct, as I have said, with a bad motive or reckless disregard of the interests of others, and before you would award punitive damages you must find that these broadcasts were published with a bad motive or with reckless disregard to the rights of others, or reckless indifference to the rights of others." (A 333).

These instructions are strikingly similar to those given the jury in *Curtis Publishing Co. v. Butts*, where this Court upheld the jury's award. See 388 U.S. at 165-66.[19] As in *Butts*, the jury was told that it could predicate a finding of malice upon evidence showing ill will or spite toward the plaintiff. Snch an instruction falls short under *New York Times*. But the Court regarded the deviation as harmless error in *Butts* since "counsel for *Butts* continually pressed upon the jury in argument that the defendant had failed to exercise a minimum of care [and] he did not seriously

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[19] The jury was instructed in *Butts* that "actual malice" under Georgia law denoted "wanton or reckless indifference or culpable negligence with regard to the rights of others" and included notions of "ill will, spite, hatred and an intent to injure one."

contend that the Saturday Evening Post was actuated by preexisting animosity toward *Butts*." 388 U.S. at 156 n. 20. The same is true here. The evidence was not directed toward a showing of ill will or spite, and indeed Mr. Rosenbloom's counsel conceded in his summation that "it is clear that no one at WIP harbored any personal animus toward George Rosenbloom" (A 448). In addition, as in *Butts*, the instructions to the jury "focused on the threshold requirement of falsity," 388 U.S. at 166, and therefore "the reference in the instructions to wanton or reckless indifference . . . most probably resulted in a verdict based on the requirement of reckless disregard for the truth of which [the Court] spoke in New York Times" (A 328).

The trial in *Butts* occurred before the decision in *New York Times*, and the Chief Justice in allowing the jury verdict to stand pointed out that "in cases tried after our decision in *New York Times* we should require strict compliance with the standard we established." *Id.* If this case involved a public figure or a public official, the instructions given below accordingly would not be adequate. But just as the trial judge in *Butts* had no reason to expect the advent of *New York Times*, the trial judge in this case had no reason to foresee its expansion to include a libel suit by a private figure, if indeed that is to be the result. In denying the defendant's motion for a judgment n.o.v. or a new trial, the trial judge carefully examined the opinions of this Court, and found no decision indicating that the *New York Times* rule should be applied to the case before him. Consequently, a remand of this case for retrial under clinically proper instructions is unnecessary to encourage lower courts to comply with decisions or mandates of this Court. As in *Butts*, the relevant inquiry is whether the jury in fact made the necessary finding upon

instructions adequate to focus its attention upon the proper question. And, as in *Butts*, the instructions were sufficient for this purpose.

As for the sufficiency of the evidence, this Court has emphasized that the burden of proof to show reckless disregard of the truth with "convincing clarity" is heavy:

> "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

Earlier cases have held that a failure to investigate beforehand does not meet this burden. See *id.* at 733; *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 84 (1967); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 153 (1967) (opinion of Harlan, J.). And in *New York Times Co. v. Sullivan*, the Court held that a refusal to print a retraction was not sufficient under the facts of that case, without deciding wheher a refusal to retract "may ever constitute such evidence." 376 U.S. at 286.

The Court of Appeals, in attempting to apply these decisions, considered "seriatim" and rejected as individually insufficient each discrete item of evidence. (415 F. 2d at 897, A 468). But the important point is that evidence is cumulative, and should not be compartmentalized for rejection piece-by-piece. Station WIP not only failed to investigate, it also rudely rebuffed Mr. Rosenbloom when he asked the station to correct the newscast. Under *St. Amant* and other cases, the failure to investigate would alone be insufficient, of course. The adequacy of the refusal to retract, considered alone, is more debatable. Neither of the two reasons relied upon for rejecting such evidence in *New York Times* is present here—the defama-

tory broadcasts clearly referred to Mr. Rosenbloom,[20] and Station WIP, rather than asking for an explanation of the point, flatly hung up on Mr. Rosenbloom. See 378 U.S. at 286.

It is unnecessary to decide whether even this discourteous refusal to retract demonstrates actual malice. Rather, the evidentiary value of the failure to retract must be considered together with, rather than separately from, the failure to investigate.

From start to finish in these broadcasts, Station WIP demonstrated not the slightest interest in determining the truth, up to and including its rejection of Mr. Rosenbloom's offer to demonstrate the truth. A holding that this evidence is insufficient "to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication" would be tantamount to a holding that defendants can avoid doubts and therefore liability by steering so far clear of the facts, even when those facts are put squarely in their course, that they never consider the issue of truth.

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[20] The first series of broadcasts referred to Mr. Rosenbloom by name. The second series did not, but the jury was properly instructed that it must find that a defamatory broadcast "could reasonably be taken to have referred to the plaintiff" (A324-25). The trial judge found the evidence on this point sufficient under Pennsylvania law (289 F. Supp. at 744, A444-46). In any event, since Station WIP at no time sought separate rulings on the two series of broadcasts, it can scarcely now object if the two series are considered together (289 F. Supp. at 747, A452).

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed and the case remanded with directions that judgment be entered for the plaintiff.

Respectfully submitted,

RAMSEY CLARK
1775 K Street, N. W.
Washington, D. C. 20006

BENJAMIN PAUL
Suite 402
Liberty Trust Building
Broad & Arch Streets
Philadelphia, Pennsylvania 19107

PAUL, WEISS, GOLDBERG,
RIFKIND, WHARTON & GARRISON

DANIEL LEVITT
WILLIAM D. IVERSON
Of Counsel

Sup

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IN THE

Supreme Court of the United States

October Term, 1969.

No. ~~947~~. 66

GEORGE A. ROSENBLOOM,

Petitioner,

v.

METROMEDIA, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT.

SCHNADER, HARRISON, SEGAL & LEWIS,
1719 Packard Building,
Philadelphia, Pa., 19102

BERNARD G. SEGAL,
IRVING R. SEGAL,
SAMUEL D. SLADE,
PETER S. GREENBERG,

COUDERT BROTHERS,
200 Park Avenue,
New York, New York, 10017
Of Counsel.

CARLETON G. ELDRIDGE, JR.,
Attorneys for Respondent.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

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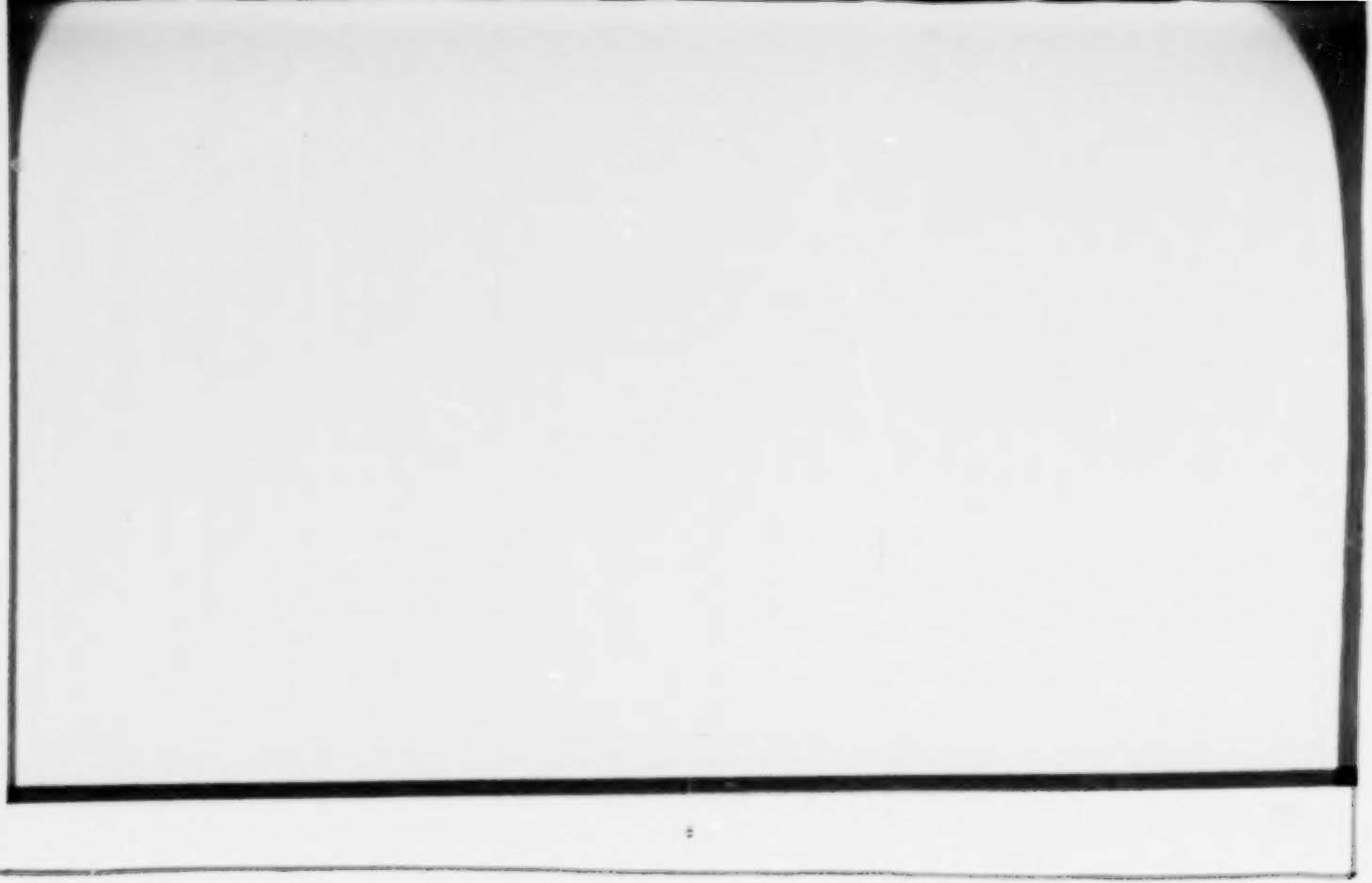
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 947

GEORGE A. ROSENBLOOM,

Petitioner,

v.

METROMEDIA, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Third Circuit (461a-471a) is reported at 415 F. 2d 892 (1969). The opinion of the United States District Court for the Eastern District of Pennsylvania (435a-456a) is reported at 289 F. Supp. 737 (E. D. Pa. 1968).

JURISDICTION.

The judgment of the Court of Appeals was entered on September 15, 1969. The petition for a writ of certiorari was filed on December 12, 1969. The jurisdiction of this Court rests upon 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether the court below correctly rejected the contention that the First Amendment protection defined by this Court in **New York Times Co. v. Sullivan,** 376 U. S. 254 (1964) must be limited to factual situations in which the defamation plaintiff is a public official or a public figure.

2. Whether the court below correctly held that the evidence adduced by petitioner in this case failed to establish that the broadcasts in issue were made with "actual malice."

CONSTITUTIONAL PROVISION INVOLVED.

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE.

A. The Facts.

In 1962, Outdoor American Company, a publisher of several so-called "nudist" magazines, offered to petitioner Rosenbloom a major distributorship which covered a substantial regional area from Atlantic City to Harrisburg and from Wilmington to Trenton (96a-97a).

Rosenbloom, who was experienced in the magazine distribution business, did not immediately accept the offer. Appreciating the problems in dealing with the subject matter, he first wanted an attorney's opinion on whether the principal owner of Outdoor American was really a "legitimate, registered nudist," whether the company had "a legal right to be in business," and whether "these magazines that they printed and published were legal" (95a-97a).

However, as Rosenbloom described it, "the potential in this area, the area that they gave me, was tremendous" (97a). Rosenbloom accepted the distributorship and entered into business on May 1, 1963 (179a). By the end of four months, he already had a well established business, involving sixty outlets at various newsstands, drugstores, and other vendors (180a), and believed that he was on his way toward attaining annual gross sales of half-a-million dollars (188a-189a).

In the fall of 1963, the Philadelphia Police Department began receiving complaints from the public concerning the allegedly obscene nature of certain books and magazines on sale at various newsstands around the city (259a-260a). At this point, there had been no adjudication that Rosenbloom was selling non-obscene materials. An investigation of these complaints was undertaken by the Special Investigation Squad under the supervision of Captain Clarence Ferguson (260a), a forty-eight year veteran of the Philadelphia Police

Force, who had participated in investigating alleged obscenity law violations for more than forty years (247a). The magazines and books complained of were purchased from the various newsstands and reviewed by Ferguson, who concluded that they were obscene (260a). In so doing, Captain Ferguson was performing one of the assigned functions of his squad. There is no support for petitioner's suggestion that Captain Ferguson, on October 1, had, as a personal matter, suddenly "decided to rid the city of pornography." (Brief for Petitioner, p. 7). As the record shows, the arrests on October 1 were preceded by complaints which led to investigation.

On October 1, 1963, the Special Investigations Squad of over 50 policemen (355a-356a) began a series of arrests which Captain Ferguson later described as "one of the largest raids in the City of Philadelphia" (249a).[1] Between October 1 and October 4, twenty-nine newsstand dealers, shippers, and distributors of allegedly obscene periodicals were arrested (99a-100a, 273a). Fifteen of the twenty-one dealers arrested on October 1 had accounts with Rosenbloom and Outdoor American, and Rosenbloom himself was arrested with a truckload of Outdoor American's magazines and books which he was delivering to one of his customers (99a). There is no basis in the record or in fact for petitioner's statement that Rosenbloom's arrest was "fortuitous" (Brief for Petitioner, p. 7). To the contrary, Captain Ferguson described Rosenbloom to WIP as one of the major distributors of objectionable literature in the City (251a).

1. WIP had no way of knowing what legal standards were applied for determining obscenity in connection with these arrests, and it is difficult to understand exactly for what purpose petitioner refers to Ferguson's admittedly unsophisticated definition thereof. Contrary to petitioner's statement (Brief for Petitioner, pp. 38-39), WIP had relied on Ferguson's reports in the past, and had found him reliable and accurate; nor had the station any reason to doubt the accuracy of his report on Rosenbloom's arrest (293a-294a).

Captain Ferguson called the United Press Wire Service and two local radio stations, one of which was WIP, to give them a detailed story of the arrests, mentioning specifically the arrest of Rosenbloom, whom Ferguson described as one of the major distributors of obscene literature in Philadelphia (248a-251a). Ferguson testified that he believed he had a duty to inform the public through the news media of major police activity and that he was authorized by the Police Commissioner to issue news releases (262a).

On the afternoon of October 1, The Evening Bulletin headlined the following report (414a-415a):

"POLICE RAIDERS ARREST 21 IN SALE OF SMUT. 5000 BOOKS AND MAGAZINES ARE CONFISCATED."

The subscribed article detailed the arrest of Rosenbloom and news dealers, all of whom were identified by name and address, and characterized the books and magazines distributed by Rosenbloom as obscene.

Other local news media also began reporting Rosenbloom's arrest, and referred to the publications which he had been distributing to the public as obscene smut (211a-215a). Rosenbloom subsequently sought damages and injunctive relief against the City of Philadelphia, the District Attorney, the Police Commissioner, The Evening Bulletin, Triangle Publications, Inc. (publisher of The Philadelphia Inquirer and The Philadelphia Daily News), and WCAU-TV, a local Columbia Broadcasting System television outlet (402a-413a), but not WIP. In that suit, Rosenbloom charged that the news media defendants had published articles, pictures, and stories on October 1, 2 and 3, 1963, which referred to Rosenbloom's publications as smut and obscene and which characterized Rosenbloom as a dealer in smut and obscenity (211a-215a, 406a-407a). One purpose of that suit, according to Rosenbloom, was to prevent further publicizing of his problem (140a). In this connection, Rosenbloom stated that he and his publisher

knew that "there were a lot of people who might disagree" with the publisher's philosophy and the type of magazine that he printed (140a).

On October 4, 1963, the police arrested seven more persons suspected of possessing or selling obscene literature, two of whom had been taken into custody after driving a truckload of alleged pornography from Maryland to Pennsylvania (273a). Rosenbloom, who had been released on bail after his first arrest on October 1, was rearrested (100a). The police discovered and seized Outdoor American nudist publications both at Rosenbloom's home and at a nearby barn which he had rented (263a).

Captain Ferguson reported the details of Rosenbloom's rearrest to WIP, including the seizure of publications which the police captain described as obscene (31a, 248a). As stated above, Captain Ferguson had given WIP information on police activities in the past and, contrary to petitioner's statement (Brief for Petitioner, p. 7), WIP had found him to be reliable (293a-294a). Rosenbloom's name had now been in the news for three days. At 6:00 p.m., on October 4, 1963, relying on Captain Ferguson as its source of information, WIP broadcast its first reference to Rosenbloom as part of its regular, half hourly newscast. The text of that portion of the newscast stated (350a):

> "The Special Investigations Squad raided the home of George Rosenbloom in the 1800 block of Vesta Street this afternoon. Police confiscated 1,000 allegedly obscene books at Rosenbloom's home and arrested him on charges of possession of obscene literature. The Special Investigations Squad also raided a barn in the 20 Hundred block of Welsh Road near Bustleton Avenue and confiscated 3,000 obscene books. Capt. Ferguson says he believes they have hit the supply of a main distributor of obscene material in Philadelphia."

Rosenbloom's trial counsel conceded that the first and second sentences, which were true (310a), and the fourth sentence, which was merely a report of a police officer's opinion (317a), were not actionable in and of themselves. Thus, his argument rested on Station WIP's reference in the third sentence to the books seized at the barn as "obscene," rather than as "allegedly obscene," apparently on the theory that this converted the third sentence into a statement of WIP's own opinion (311a).

By the third WIP broadcast of Rosenbloom's rearrest, which was aired at 8:00 p.m., the same evening, the station had added the word "allegedly" to its reference to the nudist books seized in the barn (355a-356a). In the following 12 hours, until 8:00 a.m., on October 5th, WIP broadcast the news of Rosenbloom's arrest on five more occasions. In each broadcast, all the books were described as either "allegedly" or "reportedly" obscene (350a-368a).

The final broadcast by WIP referring to Rosenbloom by name was made on October 5, 1963, at 8:00 a.m.

During the 16 days that followed October 5, WIP continued to broadcast news programs twice an hour, twenty-four hours a day. None of these 750 broadcasts, each containing anywhere from six to fifteen or twenty news items, made any reference, either direct or indirect, to Rosenbloom.

On October 21, 1963, WIP, in a regular news broadcast, included the following five-sentence report on the first hearing in the unique suit for an injunction and damages filed by Rosenbloom against city officials and various news media (369a):

> "Federal District Judge Joseph S. Lord, Third,[2] will hear arguments today from two publishers and a

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2. The injunction motion was in fact heard by Judge John W. Lord, Jr. (152a).

> distributor . . . all seeking an injunction against Philadelphia Police Commissioner Harold Leary . . . District Attorney James C. Crumlish, Jr. . . . a local television station and a newspaper . . . ordering them to lay off the smut literature racket.
>
> "The girlie-book peddlers say the police crackdown and continued reference to their borderline literature as smut or filth is hurting their business. Judge Lord refused to issue a temporary injunction when he was first approached. Today he'll decide the issue. It will set a precedent . . . and if the injunction is not granted . . . it could signal an even more intense effort to rid the city of pornography."

WIP referred to the case several times in various half hourly newscasts on October 21 (369a-392a). At no time did the station name the two publishers or the distributor. The content of the reports varied. For example, five hours after this first broadcast, WIP reported the following (381a):

> "Judge John Lord, Jr., has requested legal briefs to be filed Friday by defendants in the plea for an injunction against local police . . . the D.A.'s Office and communications media lodged by publishers and distributors of alleged smut literature. All defendants moved for dismissal."

Four days later, on October 25, the station twice reported that the defendants' answers to the complaint were due. On November 1, WIP returned briefly to the injunction case with the following broadcast (400a-401a):

> "U. S. District Judge John Lord told WIP News just before airtime that it may be another week before he will be able to render a decision as to whether he has jurisdiction in the case of two publishers and a

distributor who wish to restrain the D.A.'s office, the police chief, a TV station and the Bulletin for either making alleged raids of their publications, considered smut and immoral literature by the defendants named, or publicizing that they are in that category. Judge Lord then will be in a position to rule on injunction proceedings asked by the publishers and distributor claiming the loss of business in their operations."

Rosenbloom's complaint in the very action described in the broadcasts alleged that (1) the defendants District Attorney, the City, and the police considered his nudist magazines obscene (405a), and (2) that defendants Triangle Publications, The Evening Bulletin and WCAU-TV had published articles and programs "referring to the plaintiffs' magazines and books as smut and obscene, in a false and malicious manner, and characterized the plaintiffs as dealers in smut and obscenity" (406a-407a).

Paul Rust, WIP's news manager, testified that the primary objective of the station's news department was not profit but to inform the public of significant, newsworthy public issues and events (62a). He noted that, with respect to the federal court injunction suit reported in the second series of broadcasts, the court action itself was more significant than the identity of the particular complainants (82a-83a). Consequently, WIP never identified the complainants, nor indicated whether they had been among those arrested between October 1 and October 4, 1963.

Rosenbloom never heard any of the WIP broadcasts which allegedly caused him injury (110a, 167a). He did not positively learn that WIP had ever broadcast any reports referring to him or to his lawsuit until October 26 or 27, 1963 (133a-138a).

Rosenbloom did not produce a single witness who had heard any of the first series of broadcasts on October 4 and

5. Nor did he produce a witness who had heard any of the second series of broadcasts on October 21 and 25 and November 1.[3] Consequently, there is no evidence anywhere in the record that either Rosenbloom or a single member of the public understood the second series of broadcasts to refer to George Rosenbloom, or to any of those persons arrested between October 1 and October 4 for selling or possessing allegedly obscene literature.

Rosenbloom testified that, on October 26 or 27, at 11:00 a.m., he presented himself at WIP in order to find out if WIP had in fact been making broadcasts about him (133a-135a). On the lobby telephone used whenever members of the public wanted to speak to newscasters, Rosenbloom explained to Nate Wright, a part-time newscaster, that he had come to ascertain whether WIP was broadcasting reports about him and to learn the actual content of those reports (136a-137a). Wright asked Rosenbloom to be more specific about the date and time of the broadcasts, explaining that WIP broadcasts news twice an hour, twenty-four hours a day (137a).

Rosenbloom then asked for the October 21, 1963, 12:00 broadcast (137a). Wright looked up the broadcast and read it back to Rosenbloom.

The 12 o'clock broadcast script read as follows (383a):

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3. The trial judge stated in his opinion on Metromedia's post trial motions, that Paul Rust, news manager at WIP, "was a broadcaster and listener who knew that the second series of broadcasts was, and was intended to be, about the plaintiff" (445a). Rust made one of the second series of broadcasts describing the lawsuit without identifying the plaintiff (73a-74a). The trial judge apparently considered a "broadcaster" to be a "listener." There is no evidence that Rust either broadcast or heard any other news report referring directly or indirectly to Rosenbloom. Rust did testify that, in his capacity as news manager, he "would presume" that he was aware of the fact that the second series of broadcasts was in fact referring to Rosenbloom (54a-55a).

"Arguments before District Judge Joseph Lord, Third in a publishers-distributor plea of financial and economic hardship in the city's crackdown on alleged smut literature have been postponed until Friday at the request of Defense attorneys. A TV station, the Evening Bulletin and the DA's office are the target of one publisher and one distributing firm."

At trial, Rosenbloom claimed that the broadcast read by Wright, referred to "the smut-girlie racket" and "smut-peddlers' claims" (137a). The noon broadcast typescript on October 21 referred only to "alleged smut literature" (383a).

After Wright read the broadcast, Rosenbloom told him that "the magazines involved in this were found to be completely legal and legitimate by the United States Supreme Court"[4] (137a).

Wright replied that the District Attorney had said that the magazines published by the complainants in the federal court action described in the October broadcasts were obscene (137a).

Rosenbloom claimed to possess a public statement by the District Attorney that "my magazines are completely legal, absolutely nothing obscene about them" (137a-138a). No such statement was ever introduced into evidence at trial. At the time he made the claim to Wright, Rosenbloom was in fact seeking to enjoin the District Attorney from further alleged harassment of Rosenbloom and Outdoor American, which made his claim concerning the District Attorney's alleged approval of his magazines impossible to accept. According to Rosenbloom's testimony, "at

4. Contrary to the implications in petitioner's brief (p. 6), there is no evidence that the legitimacy of Eden Magazine, Outdoor American's publication involved in this case, has ever been considered by this Court.

that point the telephone conversation was terminated . . . he just hung up" (138a).

As shown by his own version of his brief conversation with Wright—Rosenbloom's only contact with WIP—Rosenbloom never demanded a retraction from the station.

After Rosenbloom's visit to WIP, the only WIP broadcast which referred to his lawsuit was that of November 1, 1963, (*supra*, pp. 8-9) which petitioner does not claim to be actionable.

B. Proceedings in the District Court.

Rosenbloom's suit for damage was based on the first two of the series of broadcasts made on October 4th and 5th and on the series of broadcasts beginning on October 21 with reference to the court proceeding against the City of Philadelphia, Philadelphia officials and various news media. At the conclusion of the trial, the District Judge declined to view the case as appropriate for the application of the principles of **New York Times v. Sullivan**, 376 U. S. 254 (1964) as a limitation on the right of Rosenbloom to recover. Metromedia's motion for a directed verdict (241a) and for a binding instruction (427a) were denied. Instead, the jury was instructed to consider the case under the principles of Pennsylvania defamation law (324a-334a). The jury was instructed that the state law of defamation extended a privilege to Station WIP to report accurately certain news events conditioned on reasonable conduct in making the report and the use of reasonable diligence to determine the accuracy of the broadcasts (325a-327a). On the question of punitive damages, the jury was instructed that punitive damages could be awarded if the broadcasts resulted "* * * from a bad motive or malice toward the plaintiff * * *" or were published "* * * with reckless indifference to the truth * * * or with reckless disregard of

the rights of others, or reckless indifference to the rights of others * * *" (333a). The jury returned a verdict in favor of Rosenbloom for $25,000 actual damages and $725,000 punitive damages (343a). The District Judge reduced the punitive award to $250,000 on *remittitur* (458a). In sustaining the award of punitive damages, the evidence most heavily relied upon by the District Judge concerned Rosenbloom's brief conversation with a part-time employee at Station WIP (447a-451a). On this basis, the District Judge concluded that there was "* * * a recklessness of conduct as to the rights of others sufficient to warrant punitive damages." (451a). That incident has been fully described, *supra*, pp. 10-12.

After the jury had returned its verdict, the trial judge again rejected the contention that the principle of **New York Times** controlled the case and denied alternative motions for judgment n.o.v. or for a new trial (442a, 457a). In connection with the denial of these motions, the trial judge filed an opinion (435a-456a).

C. The Decision of the Court of Appeals.

The Court of Appeals reversed the District Court and held that Rosenbloom should have been required to meet the "actual malice" standard of proof formulated in **New York Times Co. v. Sullivan**, 376 U. S. 254 (1964). The court emphasized two distinct and separate factors in its decision: (1) that the subject matter of the broadcasts was of legitimate and established public interest; and (2) that the broadcasts were of "hot news", reported under conditions where, as the court said, "It is not realistic to require thorough research or verification of each individual item * * *" (464a-466a).

Having determined that the **New York Times** principle should have been applied, the Circuit Court then reviewed the record to determine whether the plaintiff had

produced convincingly clear evidence that Station WIP had made the broadcasts with a "reckless disregard of the truth" (468a-470a). As already noted, the District Judge had declined to charge the jury that the **New York Times** principle was applicable to the case.

In considering whether there was constitutionally sufficient evidence to sustain a jury verdict in favor of Rosenbloom, the Court of Appeals examined the so-called retraction incident on which the District Judge had principally relied. The Court of Appeals stated (469a):

> "• • • We think the evidence of the incident lacked both sufficient substance and clarity to meet the standard required to show actual malice. It amounted to little more than an argument and a difference of opinion between plaintiff and one of defendant's employees at a time when all except one of the challenged broadcasts had already taken place. Its value in considering the earlier broadcasts is dubious at best. . . . We think that the episode described failed to provide evidence of actual malice with the requisite convincing clarity to create a jury issue under federal standards."

The Court of Appeals next noted that Station WIP could not be expected to make thorough investigations of "hot news" items, and that, in holding to the contrary, the District Court had placed an improper burden on the station (469a-470a). As the court had earlier observed, the primary value of "hot news" to the public lies in conveying the latest news as promptly as possible so that the public may be informed of news items of immediate public concern. Station WIP had received the story from a police officer who had always been reliable in the past and the station had no reason to doubt the accuracy of his report (293a-294a).

Finally, the Court of Appeals noted that the District Court, in sustaining the punitive damage award, had characterized "highly inflammatory references" in the second series of broadcasts as evidence of a reckless disregard of plaintiff's rights and observed that (470a):

> "* * * It is difficult to see how characterizing them as inflammatory tends to prove the requisite awareness of their probable falsity."

The Court of Appeals thus concluded that the evidence was constitutionally insufficient to support a judgment for the plaintiff, and that the District Court should have granted defendant's motions for judgment (470a).

SUMMARY OF ARGUMENT.

I.

The Court of Appeals in this case rejected the restrictive interpretation placed by the District Judge on the principle that, under First Amendment protection of freedom of the press, damages for defamation can not be recovered unless there is proof of "actual malice" on the part of the publisher. Instead, the Court of Appeals held that the First Amendment "actual malice" rule applied whenever the challenged publication involved a matter of legitimate public interest. There is, of course, no question but that the publications involved in this case covered matters of legitimate public concern.

The decision of the Court of Appeals is clearly correct. Analysis of this Court's decisions, beginning with **New York Times v. Sullivan**, 376 U. S. 254 (1964), demonstrates that the decisive consideration in determining whether the "actual malice" protection applies, is whether the publication covers a matter of legitimate public interest. The availability of the protection does not turn on the status of the defamation plaintiff. Where, as here, the broadcasts were of matters of legitimate public concern, the fact that the defamation plaintiff was not a "public official" or a "public figure" is of no relevance.

Petitioner appears to concede that some form of First Amendment protection is warranted for the broadcasts in issue but urges that that protection is adequately measured by reference to the state law of defamation. Specifically, he argues that the "reasonable care" standard used in Pennsylvania to test the qualified privilege of fair comment will furnish sufficient constitutional protection to the broadcasts. This Court, in **New York Times**, has already rejected this "reasonable care" test, recognizing the self-censorship that would inevitably result from its use.

II.

The District Judge refused to charge the jury that the broadcasts in this case were entitled to any form of constitutional protection. His state law instructions on punitive damages fell short of a constitutionally adequate statement of the "actual malice" standard.

Even assuming adequate instructions, the record in this case can not constitutionally support a finding of "actual malice." There is no evidence that respondent entertained serious doubts as to the truth of the broadcasts. On the one occasion when petitioner communicated with respondent, after the challenged newscasts had been made, petitioner gave respondent no reason to doubt the accuracy of the newscasts. Respondent, in the course of preparing its half hourly, round-the-clock newscasts, had relied on experienced, reliable or customary sources, sources which were also used by the rest of the Philadelphia news media.

ARGUMENT.

I.

The Court of Appeals Correctly Held That, Because WIP's Broadcasts Concerning Petitioner Rosenbloom Involved Matters in Which the Public Had a Legitimate Interest, Those Broadcasts Were Protected by the First Amendment Standards of Proof Developed in New York Times Co. v. Sullivan.

A. The Rationale Underlying the Rule of New York Times Applies to the Present Case.

The Court of Appeals apparently assumed *arguendo* the District Court's conclusion that petitioner Rosenbloom was not a "public figure," [5] as defined in **Curtis Publishing**

5. Respondent maintained below and still takes the position that Rosenbloom indeed was a "public figure". The Supreme Court has never indicated that a "public figure" must be famous or notorious prior to the time when the allegedly defamatory statements are published. Instead, "public figure" means an individual whose deliberate conduct directly affects a substantial public issue, and in whose conduct the public consequently obtains a legitimate interest. *E.g.*, **Associated Press v. Walker**, 388 U. S. at 155. It would appear that anyone, anonymous or otherwise, might "thrust" himself into the heat of public debate and thereby become a "public figure." Rosenbloom, by his deliberate conduct, assumed the risk of exposure to the public eye. This did not require him to pursue "a role of leadership in public affairs." (Brief for Petitioner, p. 14.) Rosenbloom knew the controversial nature of Outdoor American's publications. He had requested an attorney's opinion on the legality of the publications. Regardless of whether the magazines were legally "obscene," Rosenbloom could not have helped but know that they were the subject of public controversy and were subject to intense criticism from certain members of the public (See, *e.g.*, 140a). Admittedly, Rosenbloom was "only trying to make a living," but he chose to do it in an area likely to excite public opinion. By becoming an active dealer in these magazines, Rosenbloom thrust himself "into the 'vortex' of an important controversy" *Id.* This qualified Rosenbloom as a "public figure" for First Amendment purposes.

Rosenbloom's arrest as part of this controversy gives additional support to the characterization of him as a "public figure."

Co. v. Butts, 388 U. S. 130 (1967), but nonetheless held that "the absence of a public figure [was not] of controlling importance here." (467a). Instead, the Court of Appeals ruled that the public interest in the subject matter of the broadcasts, coupled with the type of broadcasts involved, required the First Amendment protection guaranteed under **New York Times v. Sullivan,** 376 U. S. 254 (1964). The Court of Appeals thus ruled that, in order to obtain a constitutionally valid verdict, it was necessary for petitioner to establish that respondent's broadcasts were made with "actual malice" as defined in **New York Times** and subsequent decisions of this Court. This conclusion has been reached by other courts presented with the same issue and has been endorsed by commentators. See **Wasserman v. Time, Inc.,** 38 U. S. L. Week 2477 (D. C. Cir. March 10, 1970); **United Medical Laboratories v. Columbia Broadcasting System,** 404 F. 2d 706 (9th Cir. 1968), *cert. denied,* 394 U. S. 921 (1969); **Bon Air Hotel, Inc. v. Time, Inc.,** 295 F. Supp. 704 (S. D. Ga. 1969); **All Diet Foods Distributors, Inc. v. Time, Inc.,** 290 N. Y. S. 2d 445, 56 Misc. 2d 821 (Sup. Ct. 1967); **Time, Inc. v. McLaney,** 406 F. 2d 565 (5th Cir. 1969), *cert. denied,* 395 U. S. 922 (1969); Kalven, **The Reasonable Man and The First Amendment: Hill, Butts,** and **Walker,** 1967 The Supreme Court Review 267, 278-90; 18 Cath. U. L. Rev. 423 (1969); Note, 67 Colum. L. Rev. 929, 949 (1967); Pedrick, **Freedom of the Press and the Law of Libel,** 49 Cornell L. Q. 581, 592 (1964).

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5 (cont'd)

See, *infra,* p. 42 and argument at p. 31, fn. 15. The press could not be expected to inquire as to whether the arrest was justified. Such investigation would necessarily be inconclusive with respect to the legality of the arrest, would always be impractical and would be impossible with respect to the kind of "hot news" (See *Id.* at 157) which an arrest generally is.

In addition, Rosenbloom's novel litigation with local law enforcement agencies and news media (other than respondent) further limelighted his already acquired "public figure" status.

At the outset, petitioner obscures the real issue presented in this case by arguing that if the standard of **New York Times** is applied to Rosenbloom's action, it must also apply "to every libel suit." (Brief for Petitioner, p. 17). Petitioner's contention is based on the premise that the courts are constitutionally required to accept anything offered by the media as "newsworthy." This is patently untrue, and in any event is inapplicable in the present case.

There is no reason to assume that a judicial determination of what is legitimately in the public interest cannot be made. Petitioner himself, at a later point in his brief, argues that a distinction *can* be made between " 'matters of legitimate public interest' " and " 'matters of mere public curiosity.' " (Brief for Petitioner, p. 35). Certainly a holding that **New York Times** protection must be accorded to matters that are "newsworthy" in the sense that they are matters of legitimate public interest in no way requires the additional conclusion that *everything* that the media chooses to report is a matter of legitimate public interest.[6]

In any event, petitioner is in a poor position to press this argument. The broadcasts covered petitioner's arrest

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6. The Court adverted to a similar distinction in **Garrison v. Louisiana,** 379 U. S. 64, 72 n. 8 (1964) by indicating the existence of a "discrete area of purely private libels" in cases involving public officials. This can only be taken to refer to a statement which, although made about a public official, nonetheless does not refer to a matter of *legitimate public interest.*

Thus petitioner's statement that affirmance in this case necessarily requires reversal in **Monitor Patriot Co. v. Roy,** No. 891, *cert. granted,* February 24, 1970 (Brief for Petitioner, p. 18, n. 4), is unacceptable. If the proper standard for determining whether **New York Times** protection is to apply focuses on whether a publication involves matters of legitimate public interest, it would remain open to the Court to hold that Roy was subjected to private libel, *i.e.,* a defamatory statement concerning a subject with which the public had no legitimate concern. Whether the **Roy** record presents such a situation is another question, especially since Roy himself conceded at trial that the "bootlegging" charge, if true, would have been a relevant consideration to voters. (Record in No. 891, 9:158.)

for the sale and distribution of controversial material, objectionable to a significant portion of the community, and a unique law suit to insulate petitioner from "attack" by the City of Philadelphia, its law enforcement officers, and the news media. Neither the District Court nor the Court of Appeals had any doubt that the broadcasts involved matters of public interest, a point conceded by petitioner in his petition for certiorari (p. 2), as well as in his principal brief before this Court (p. 14). Thus, the question whether a matter of mere "public curiosity" which is defamatorily publicized by the media is also entitled to **New York Times** protection is not even properly presented by this record. The basic question here is whether broadcasts concerning matters of legitimate public interest come within the rule of **New York Times.**

The decision in **New York Times** is, in essence, a logical corollary of cases such as **Thornhill v. Alabama,** 310 U. S. 88, 95 (1940) and **N. A. A. C. P. v. Button,** 371 U. S. 415 (1963). **Thornhill** made clear that freedom of expression concerning public questions comes within the protection of the First Amendment. **Button** held that for First Amendment rights to be viable, they must be provided with "breathing space." The Court in **New York Times Co. v. Sullivan** held that First Amendment freedoms were not afforded sufficient "breathing space" if the fear of their utilization might lead to self-censorship:

> "* * * The judgment awarded in this case * * * was one thousand times greater than the maximum fine [for criminal defamation] * * *. Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive * * *.
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> "• • • A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions • • • does not mean that only false speech will be deterred • • •. Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true • • •. The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments." 376 U. S. at 277-79.

The Court, in **New York Times**, did not reject the value of state defamation laws, nor did it endorse the making of false statements directed at public officials; it simply conceded, quoting Madison, that "'some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press.' 4 Elliot's Debates on the Federal Constitution (1876), p. 571." 376 U. S. at 271. Rather, "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open • • •" required the press to be free from the fear of devastating damage claims for conduct which does not involve calculated falsehood. 376 U. S. at 270. Although false statements do not in themselves merit First Amendment protection, erroneous publication must be tolerated and protected to insure the ability of the press properly to air matters of public concern. **St. Amant v. Thompson**, 390 U. S. 727, 732 (1968).

The opinion in the **New York Times** case provides only a starting point for the development of a First Amendment doctrine which protects the news media in its attempts to report on "public issues." The ultimate reach of **New York Times** must be established by case-by-case evolution. **St. Amant v. Thompson**, 390 U. S. 727, 730 (1968). See, *e.g.*, **Pickering v. Board of Education**, 391 U. S. 563 (1968). Thus, the **New York Times** rule already has been applied to cases different on their facts from **New York Times**

itself, and logic requires that the present case, involving a news broadcast of undisputed public interest, be brought within the protection of the **New York Times** standard.

In **New York Times**, the Court, properly dealing only with the facts before it, applied the "actual malice" standard to suits brought by public officials as an initial step in developing constitutional protection for news media reports of public issues. **Rosenblatt v. Baer**, 383 U. S. 75 (1966) then gave early indication that the **New York Times** doctrine would evolve by the application of logical, not mechanical, tests.

Rosenblatt held that a relatively obscure county recreation supervisor could be encompassed by the "public official" category. Quoting from the **New York Times** endorsement of vigorous debate on public issues, the Court in **Rosenblatt** held that a "public official" was one who holds a "position in government [which] has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, * * *" 383 U. S. at 86. Thus, "public official" is defined in *terms of interest of the public* in the performance of a given job. The Court focused on the public's right to be informed about vital matters of public import in determining about whom the press could write without fear of the chilling danger of a large defamation verdict for conduct falling short of actual malice.

Curtis Publishing Co. v. Butts and **Associated Press v. Walker**, 388 U. S. 130 (1967) logically brought "public figures" as well as "public officials" within the First Amendment protections of **New York Times**. The Court[7] noted

7. Mr. Justice Harlan delivered the judgments of the Court and authored the opinion which brought "public figures" within the constitutional ambit of **New York Times**. However, a

that "the public interest in the circulation of the materials here involved, and the publisher's interest in circulating them, is not less than that involved in **New York Times**. And both Butts and Walker commanded a substantial amount of independent public interest at the time of the publication; * * *" 388 U. S. at 154-55.

The situation in **Walker** is particularly instructive. Walker was held to have come within the **New York Times** standard by having thrust himself "into the 'vortex' of an important public controversy, * * *" *Id.* at 155. Because he had a role in a matter of public interest, Walker could not prevail in a libel suit, the success of which would deprive the press of the "breathing space" necessary to inform the public about public controversies. Accordingly, **New York Times** of necessity applied.

Wally Butts was subject to the limitations imposed by **New York Times** because the public had a legitimate interest in his conduct. General Walker, described as a man of some political prominence, 388 U. S. at 140, might have been of some interest to the public for that reason. Nevertheless, it is clear that the public's primary interest lay in Walker's conduct with respect to a vital public question. The public would have an equally compelling and legitimate interest in any person, regardless of how "private" or anonymous he might previously have been, who made a speech as Walker did to an angry segregationist mob at the University of Mississippi. The public's primary interest is in the conduct of the speaker and in the content, effect and significance of the speech, not in the speaker's prior fame or notoriety.[8] As one commentator has pointed out:

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7 (cont'd)
majority of the Court rejected Mr. Justice Harlan's thesis that a different standard of protection than the **New York Times** actual malice rule should apply.

8. The prominence of the plaintiff at the time the defendant speaks bears little relationship to the essential First Amend-

"It is not because one is a public official [or a public figure] that one's rights in defamation are limited; rather, it is because recovery would have an inhibiting effect on discussion of a public *issue* * * * the nature of the issue, not the charaterization of the plaintiff, is determinative". Note, 67 Colum. L. Rev. 929, 949 (1967) (Bracketed material added.)

Time, Inc. v. Hill, 385 U. S. 374 (1967) confirms the soundness of this approach. In the **Hill** case, plaintiff was a non-public figure who brought an invasion of privacy action against defendant publisher. The action rested on defendant's magazine article containing false statements about the experiences of plaintiff's family while held hostage by escaped convicts. This Court recognized that plaintiff was an inconspicuous private citizen exposed involuntarily to the public eye and thus subjected to embarrassment and injury. This, however, was not enough to remove First Amendment protection from the defendant under the actual malice standard.

Because of the New York Court of Appeals' interpretation of state law, the Supreme Court, in **Hill**, was not faced with having to determine the constitutionality of a rule that would subject publishers to liability for totally true, but privacy-invading statements. This would present a parallel to the defamation rule which constitutionally prohibits liability for *true* statements made about public officials "on a showing of malice in the sense of ill will." **Garrison v. Louisiana**, 379 U. S. 64, 71-72 (1964). As Professor Kalven wrote, it became unnecessary for the Court to state explic-

8 (cont'd)
ment values underlying *protection of the words spoken*. Indeed, conditioning the scope of the privilege upon the status of the party defamed revives the logical error committed by those who attempted to limit the **New York Times** privilege to public officials as defined in **Barr v. Matteo**, 360 U. S. 564 (1959). This argument was explicitly rejected in **Rosenblatt v. Baer**, 383 U. S. 75, 85, n. 10 (1966).

itly its key premise, *i.e.*, "that the 1st Amendment requires that the truthful reporting of newsworthy events and people not be subjected to liability. * * * [T]he ambit of 'constitutionally scrutinizable' speech is measured by newsworthiness." Kalven, *supra*, at p. 281.[9]

Time v. Hill presents a case where private citizens were exposed to the glare of publicity by a magazine article which contained false, as well as true, statements which proved embarrassing and damaging to plaintiffs. Nonetheless, the publisher was held to be protected under the standards announced in **New York Times**. In defining the borders of First Amendment actual malice protection, the Court stated:

> "The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. 'Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of

9. Petitioner argues that **Hill** is irrelevant to defamation actions because the Court in **Butts** and **Walker**, decided after **Hill**, relied on a "public figure" test. Although it has been suggested that it would have been more logical to have concluded in **Butts** and **Walker** that **Hill** "foreclosed the ambit issue", Kalven, *supra*, at 286, the treatment in **Butts** and **Walker** reflects the Court's concern with developing the **New York Times** doctrine on a case-by-case basis, without making commitments to positions not presented within the narrow borders of the case before the Court.

society to cope with the exigencies of their period.' *Thornhill v. Alabama,* 310 U. S. 88, 102. * * *'' 385 U. S. at 388.

Time v. Hill thus establishes that matters that are of legitimate public interest are within the area of First Amendment concern. There seems no logical reason for distinguishing invasions of privacy from defamations in determining the area to which the First Amendment applies.[10] Initially, once it is determined that a certain *type* of communication, *i.e.,* a report of a legitimately newsworthy occurrence, is within the area where constitutional protection applies, it is illogical to remove that type of speech from the protected area because of a distinction in the bases of particular *plaintiffs'* causes of action.

Regardless, the relative "worth" of privacy as opposed to reputation can be determined only on an individual basis,[11] depending on one's personality and values, station in life, family position, geographic location, and other factors. This is especially true in the context of the **Hill** case, where privacy was deemed to involve not only interference with the "pure" right to be left alone, but fictionalization as well. Thus, the Court in **Hill** noted that, while exposure to the public view was, of course, the primary problem in a privacy case, damage to reputation, the heart of a defamation cause of action, played a part as well. 385 U. S. at 385

10. The Court of Appeals, perhaps reluctantly, accepted the District Court's conclusion that the statements in the first series of broadcasts were actionable as libel *per se* (462a-463a), since the omission of the word "allegedly" in a single sentence of the broadcast could scarcely convert privileged reporting into a non-privileged category (*supra,* p. 7). Accordingly, this record (at least as to the first series of broadcasts) perhaps more realistically deals with nondefamatory matters and proximates some of the material in **Hill.**

11. Indeed, the right of privacy might be viewed as more substantial than reputational rights, having risen under certain circumstances to constitutional stature. See, *e.g.,* **Griswold v. Connecticut,** 381 U. S. 479 (1965).

n. 9. Consider, for example, that in **Hill**, the article at issue was concerned with beatings received by the family, and in addition, indicated that the Hill's daughter had been "subjected to a verbal sexual insult." *Id.* at 378. Certainly, the difference in the damage inflicted by a publication of this type, grounded in untruth, and that following from a "usual" defamation is conjectural at best, and is intimately related to the personality of any given plaintiff. For example, it can be safely assumed that the Hill family suffered more from publication than did General Walker. Thus, if there is any distinction between the damage inflicted by defamation and the damage inflicted by invasion of privacy, it is so variable and conjectural that it can not logically be raised to a constitutional dimension.

In short, the rationale of **New York Times**, which gives "breathing space" to First Amendment liberties "by insulating conduct previously considered one step beyond those rights," Comment, 115 U. Pa. L. Rev. 238, 256 (1966), and of **Hill**, gives the press constitutional protection in reporting matters of public interest. Kalven, *supra*, at 284.

Petitioner's argument, apparently accepted by the District Court, that in a defamation context, the non-public figure's inability to "answer" charges or statements made against him because of his lack of access to the public forum removes communications involving matters of public interest from the First Amendment protection of **New York Times** is unsound.

The common law right to recover damages for defamation does not depend on the power of the defamed person to respond but is grounded on the theory that a response to the defamatory statement will not suffice to cure the claimed harm. In other words, a plaintiff's right to recover special or general damages for defamation is not lessened or lost by a showing that he had opportunity to answer. By the same token, the question whether the challenged statement on a matter of public interest is entitled to First Amendment

protection should not be held to turn on whether there was a power of response in the defamation plaintiff. The regulations and rules of the Federal Communications Commission which govern the activities of broadcasters should be considered in evaluating this "counter-argument" advocacy of petitioner. Cf., **Farmers Educational and Coop. Union v. W. D. A. Y., Inc.**, 360 U. S. 525 (1959); **Red Lion Broadcasting Co. v. F. C. C.**, 395 U. S. 367 (1969).[12]

Another obvious weakness in the unequal access argument is that it assumes that the "public figure" will continue to have access to the public forum to respond to the defamatory statements. While this might be true if the category of "public official" or "public figure" had been limited to upper echelon government officials, and extremely famous persons, it can hardly apply to individuals like the plaintiff in **Rosenblatt v. Baer**, *supra*,[13] who was nothing more than the deposed supervisor of a county recreational area. It does not seem likely that Baer's access to the public forum would have been any greater than petitioner Rosenbloom's at the time the defamatory statements directed at the two were made.

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12. Petitioner correctly concedes that "this case does not involve . . . the fairness doctrine" (Brief for Petitioner, p. 32; see, also, footnote 16). Like the **New York Times** rule, the fairness doctrine is "issue oriented" and not "person oriented." The personal attack provisions of that doctrine do not apply to *bona fide* news broadcasts, thus giving greater First Amendment latitude in the performance of a broadcaster's affirmative duty to inform the community on matters of public interest and concern. **Red Lion Broadcasting Co. v. F. C .C.**, *supra*, at 374.

13. For additional cases on who is a public official, see **Beckley Newspapers v. Hanks**, 389 U. S. 81 (1967) (state court clerk); **Swaaley v. United States**, 376 F. 2d 857 (C. Cl. 1967) (federal shipyard official); **Pape v. Time, Inc.**, 354 F. 2d 558 (7th Cir. 1965) (deputy chief of detectives) (cases cited therein); **Gilberg v. Goffi**, 21 App. Div. 2d 517, 251 N. Y. S. 2d 823 (1964) (partner in mayor's former law firm); **Klahr v. Winterable**, 4 Ariz. App. 158, 418 P. 2d 404 (1966) (member of university student senate).

Finally, to condition First Amendment protection upon the defamed party's access to the news media ultimately suggests constitutionally unsupportable discrimination. For example, a newspaper might publish a defamatory report about two equally anonymous individuals, one wealthy and one poor, both of whom clearly had been "intimately involved" in a controversy of substantial public significance. The wealthy, anonymous man could buy access to the media. The poor, anonymous man could not. The proposition that the rich man, solely because of his wealth, is less entitled than the poor man to legal protection of his reputation would violate the equal protection concept of the Fourteenth Amendment. Further, the public has an equal interest in the conduct of each man, and the First Amendment protection of the published statements rests on the public's right to know, and not on the plaintiffs' relative wealth.[14]

In addition, petitioner argues that unlike, for example, Butts and Walker, he did not "assume the risk" of being

14. In making his "unequal access" argument, Rosenbloom implied that WIP was somehow at fault in mentioning him by name in reporting the initial news stories about the police raids and attendant arrests. As a practical matter, it is logical that in broadcasting a news report of an arrest, WIP, following accepted practice in reporting arrests (cf. 414a-415a), would give the name of the person or persons arrested. The fact that WIP did not name all twenty-nine persons arrested is irrelevant, especially considering the fact that Rosenbloom was identified as a major distributor by the police and that WIP's reports consisted of five minute newscasts that covered numerous other items, including other arrests (350a-351a).

Furthermore, Rosenbloom's identity was in itself a matter of public concern. There is no doubt that Rosenbloom was engaged in a business which was objectionable to a not insubstantial number of persons in the community. Rosenbloom knew this (140a). Regardless of whether or not the publications were obscene, objecting persons might be interested in showing their displeasure with Rosenbloom's activities, perhaps by exercising their own First Amendment rights at a peaceful demonstration at Rosenbloom's place of business. Likewise, persons upholding Rosenbloom's right to sell the materials in question might wish to support him in a similar manner.

defamed by constitutionaly protected publications. This is so, according to petitioner, apparently because Butts and Walker were known to the public before the defamatory publication appeared.[15] This argument ignores the fact that Rosenbloom *voluntarily* became involved in an endeavor that could not help but stir public emotions, a fact he knew well from the outset. See, *supra,* p. 3, fn. 1. Furthermore, Rosenbloom *voluntarily* brought a lawsuit which he knew was novel. Petitioner could not have expected to profit from the sale of his magazines without becoming involved in the controversy surrounding their allegedly detrimental effect on the community. As petitioner concedes, legitimate public concern goes far beyond the narrow area of government. It would seem unarguable, regardless of one's opinion on the subject, that the debate concerning the effect of petitioner's nudist magazines on the moral structure of the community was at least as important as the Georgia-Alabama football game.

In the end, it is evident that the present case is exactly of the type that the rationale of the **New York Times** rule intended to protect. WIP provided around-the-clock news broadcasting on the hour and half-hour. The rough physical appearance of the scripts which were in evidence at the trial in this case dramatizes the haste with which these newscasts must be assembled and prepared for broadcast. This type of almost instantaneous reporting of important public events is a function which radio can perform particularly well. Certainly it cannot be disputed that the public has a strong interest in receiving speedy reports of

15. This argument assumes that a second and subsequent publication might be entitled to constitutional protection but that a first publication would not be so protected, an obviously untenable distinction. As observed in the **United Medical** case, 404 F. 2d at 712, "* * * though limelight may be a factor in public interest occurring, it can hardly be held to constitute a condition for the right of public interest to exist."

matters of public controversy. The Court of Appeals correctly noted that WIP was in the business of broadcasting "hot news," see **Curtis Publishing Co. v. Butts**, 388 U. S. at 157 (opinion of Mr. Justice Harlan). If the First Amendment protection enunciated in **New York Times v. Sullivan** is not afforded to broadcasts of this type, the fear of a devastating damage suit like the one brought in the present case may make the risk of continuing this type of newscast prohibitive. Clearly this would produce the type of "chilling effect" that **New York Times** aims at eliminating. Thus, the **New York Times** standard of "actual malice" is necessary to provide the requisite amount of "breathing space" to permit the continuation of news broadcasting, a type of communication of obvious First Amendment concern. In short, some negligent error, not resulting from actual malice, must be tolerated to permit the viable functioning of radio's "instant news" service. The Court of Appeals joined other courts and commentators in reaching the proper result on the basic issue, and its decision should be affirmed.

B. Petitioner's Proposed Standard of "Reasonable Care" Is Constitutionally Inadequate.

Petitioner apparently acknowledges that WIP's broadcasts are deserving of constitutional protection, but maintains that they should be judged under a "reasonable care" standard. This approaches the position taken by Mr. Justice Harlan in **Butts** and **Walker**, and in **Hill**, which was rejected by a majority of the Court, and which presents numerous theoretical difficulties. See Kalven, *supra*, at 298-303.

In addition, several considerations suggest that a mere showing of negligence should not be sufficient to cause defeasance of the First Amendment protection which attached to Metromedia under the facts of this case. The application

to communication activities of the ordinary tort liability rules found appropriate for other activity would be entirely inconsistent with the "preferred position" historically accorded to free speech. Tort liability rules serve not only to compensate the injured, but also to inhibit injurious conduct by others. Inhibition of many activities is perfectly acceptable, but inhibition of free speech is repugnant to the First Amendment. Compare **New York Times**, at 376 U. S. at 278-279. As one observer has expressed it, "That, in brief, is what the traditions of the First Amendment are all about—a special sensitivity to the risks of inhibiting communications activity and services." Kalven, *supra*, at 301. If the principle that "debate on public issues should be uninhibited, robust, and wide-open," (**New York Times**, 376 U. S. at 270), is to be maintained, then, in the world of the First Amendment, there can be no room for a censorial power based on "the reasonable, prudent man." Kalven, *supra*, at 303.

Petitioner's argument that this Court has considered reasonable care to be a utilizable standard in dealing with First Amendment questions is unsupportable. In fact, there is indication that the Court believes that subjecting publishers to liability for mere negligence would chill First Amendment freedoms by promoting self-censorship.[16]

The answer to petitioner's contention is that **New York Times** and its progeny already have decided that the reason-

16. **Ginsberg v. New York**, 390 U. S. 629 (1968), the only case cited by petitioner in support of his position, is inapposite. **Ginsberg** sustained against attack on *vagueness grounds*, a state statute that prohibited the sale of certain materials to minors, while affording a seller a defense of "honest mistake" as to the buyer's age. *Id.* at 645. The Court merely held that the statute's proviso that "a reasonable bona fide attempt to ascertain the true age" of the purchaser made the statute sufficiently specific. This narrow inquiry, presented in a vagueness context, is not at all similar to that which would be required of WIP in the present case, were it obligated to be non-negligent in the preparation of materials for its half hourly newscasts.

able care test is not enough, once a First Amendment question is presented. Obviously, if the Court in **New York Times** believed that subjecting publishers to a negligence test would not promote self-censorship, it would have been unnecessary to apply the actual malice standard. **New York Times** thus must be read as a clear-cut decision that self-censorship, and the attendant chilling of free speech, necessarily would result if publishers were to be held liable for negligent defamations. The high likelihood of self-censorship is equally present regardless of the status of the plaintiff, be he public official, public figure, or actor in a matter of legitimate public interest. Of course, where legitimate public interest is not involved, speech might be completely outside the zone of constitutional interest. But no one maintains that this rule would apply in the present case. Even petitioner notes that the "critical question is what constitutional standard will protect public debate here." (Brief for Petitioner. p. 32).

The Court in **Time v. Hill** again made clear that a negligence test could not be constitutionally valid. 385 U. S. 389. Although the Court admittedly noted that reasonable care would be an *especially* inadequate standard in a privacy case, its reasoning reaffirms the decision that negligence would be a constitutionally unsupportable test in a defamation case as well. Requiring a publisher to guess whether a jury would find reasonable its investigatory procedures here too would cast a pall over the use of speech protected by the First Amendment.

Under **New York Times**, the Court has been quite strict in requiring a *de novo* review of the evidence of actual malice so as to insure constitutional protection. See p. 37, *infra*. Petitioner's proposed reasonable care test falls so far short of this standard as to be patently inadequate. Even if petitioner be correct in maintaining that a lesser degree of protection should be applied in the reporting of

"hard news" to the public (a position with which we cannot concur),[17] the record in this case demonstrates that defense counsel alternatively requested the District Court to charge the jury in accordance with the "Rule of Four" drawn from the more conservative minority view of the First Amendment expressed by Justice Harlan in the **Butts** case (427a). The requested charge was denied (336a), even though the record convincingly demonstrates that there was not the slightest departure from "accepted publishing standards" (406a-407a, 414a-415a).

II.

The Evidence of "Actual Malice," Under Constitutionally Established Standards, Is Insufficient to Support a Jury Verdict for Rosenbloom.

A. Error in the Charge of the District Court.

The refusal of the trial court to charge the jury that Metromedia's defense must be considered under the standard of constitutional protection of the **New York Times** case was prejudicial error; and this error was not cured by the fact that the jury awarded punitive damages under state law instructions. The showing of malice necessary under state law for an award of punitive damages may be predicated, as the trial judge charged, upon ill will toward the plaintiff, or upon "reckless disregard of the rights of others" (333a). As the Supreme Court has made plain, the proper charge on the actual malice standard defined in the **New York Times** case requires a finding that the defendant had

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17. The reporting of police interference with the claimed First Amendment rights of petitioner and his subsequent court attempts to curtail these same press freedoms is, in our judgment, a matter of the highest public interest and concern, deserving of an absolute or near absolute privilege.

knowledge of the falsity of the challenged statements or a high degree of awareness of their falsity or probable falsity. The distinction between this charge and the usual state law charge on punitive damages has been meticulously observed by the Supreme Court, and strict adherence to the **New York Times** standard has been required. See **Beckley Newspapers v. Hanks**, 389 U. S. 81 (1967); **Associated Press v. Walker**, 388 U. S. 130 (1967). As Chief Justice Warren warned in the **Butts** case (388 U. S. at 166):

> "Unquestionably, in cases tried after our decision in *New York Times* we should require strict compliance with the standard we established. * * *"[18]

In other words, the erroneous charge given by the trial court alone required the granting of a new trial, even assuming *arguendo* that the record could support a jury finding of actual malice on constitutionally proper instructions.

B. The Record Could Not Constitutionally Sustain a Finding of "Actual Malice" and the Granting of a Judgment N. O. V. Should Be Affirmed.

Even under a proper charge, a jury verdict finding of "actual malice" could not be sustained on this record. The Court stated in **New York Times** that "considerations of

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18. The **Butts** case was tried before the Supreme Court announced its decision in the **New York Times** case and the instructions there given by the trial judge were not strictly in compliance with the **New York Times** standard. As noted above, Chief Justice Warren, who cast the decisive vote in the 5-4 decision affirming the plaintiff's verdict in **Butts**, made plain that, in cases tried after the **New York Times** decision, no deviation from the **New York Times** standard would be accepted. The erroneous charge in this case can hardly be excused on grounds of "surprise," in light of the number of courts and commentators which were fully capable of determining that **New York Times** was applicable to a case of this type without the benefit of an explicit ruling by this Court. See p. 19, *supra*.

effective judicial administration require" the appellate court "to review the evidence in the present record to determine whether it could constitutionally support a judgment" for the plaintiff. 376 U. S. at 284-285. The Court reiterated the principle that, in cases involving free speech, an independent examination of the record is warranted, 376 U. S. at 285, and proof of actual malice must appear to be of a convincingly clear quality, 376 U. S. at 285-286; **Beckley Newspapers v. Hanks**, 389 U. S. at 83. The Court of Appeals properly followed these dictates in ruling that, on the record before it, a judgment n.o.v. for respondent should have been entered.

The issue is whether the evidence demonstrated that WIP had made the broadcasts with reckless disregard of their truth or falsity. In **St. Amant v. Thompson**, 390 U. S. 727, 731 (1968), the Court noted that prior cases made "clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."

In attempting to establish actual malice, petitioner strongly emphasizes his own testimony concerning his visit to WIP in late October, 1963, describing the station's alleged disregard for his protests. This evidence apparently greatly influenced the District Court (449a-450a). In **New York Times**, the Court held that defendant's refusal to retract an allegedly libelous advertisement was not adequate evidence of malice for constitutional purposes. The Court did not decide "whether or not a failure to retract may ever constitute such evidence." 376 U. S. at 286.[19]

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19. See also **New York Times v. Connor**, 365 F. 2d 567, 576 (5th Cir. 1966) (refusal to retract held inadequate evidence of reckless disregard of the truth).

An alleged refusal to retract would appear to have little evidentiary value as to whether acts which took place *before* the refusal to retract were committed with actual malice. The standard for determining whether a defendant acted with reckless disregard of the truth focuses on whether he "in fact entertained serious doubts as to the truth of his publications," **St. Amant v. Thompson,** 390 U. S. at 731. He must act with a "high degree of awareness" of the probable falsity of the statements published. **Garrison v. Louisiana,** 379 U. S. at 84. Therefore, the existence or nonexistence of a "reckless" state of mind depends upon the information possessed by the publisher at the time of the publication.

A publisher's subsequent refusal to retract is not even necessarily *consistent* with a prior awareness of the probable falsity of his statements. Absent a showing of ill-will towards the plaintiff, which concededly is not present in this case, a refusal to retract would, if anything, seem to indicate that the defendant believed that his prior statements were *true.* Certainly, if a publisher held no personal animosity toward a plaintiff, there is no reason why a refusal to retract in any way would logically indicate that the publisher had previously entertained serious doubts as to the truth of his publications.

Of course, a request for retraction arguably could put a publisher on notice that the accuracy of his prior statements might be questionable. But this would provide evidentiary support for a finding of "recklessness" only with respect to publications made *after* the request for retraction. Here, the only broadcast by WIP after Rosenbloom's visit, made on November 1, 1963, was an entirely accurate report of a judicial proceeding. See, *supra,* pp. 8-9, 12. After Rosenbloom's conversation with Nate Wright, the station checked with Judge John Lord before making its totally accurate broadcast of November 1, 1963. Without

question this procedure evidenced WIP's high regard for the truth of its news reports; prior to Rosenbloom's visit, the station had had no reason to entertain doubts as to the accuracy of its broadcasts.

Even assuming *arguendo* that a refusal to retract could serve as evidence indicating "actual malice" as to acts committed prior to the refusal, it is difficult to see how significant weight can be attached to Rosenbloom's testimony concerning his conversation with respondent's part-time newscaster in this case. The record does not indicate that Rosenbloom ever made a request for a retraction. Rather, Rosenbloom merely stated that he had come to the station to learn whether certain statements had been made about him and his lawsuit. He told Wright that the Supreme Court had declared his magazine to be legal,[20] and that he had a statement from the District Attorney which admitted that the magazines were legal. Wright knew that Rosenbloom, at that very time, was seeking to enjoin the District Attorney from prosecuting Rosenbloom on the

20. Petitioner's brief (p. 6) refers to **Mounce v. United States**, 355 U. S. 180 (1957) as suggested support for this portion of Rosenbloom's conversation with Wright. The **Mounce** decision, one paragraph in length, merely remanded the Ninth Circuit's decision holding certain publications obscene, to the district court for reconsideration in light of **Roth v. United States**, 354 U. S. 476 (1957). No opinion was offered on the obscene nature of the magazines. Subsequent disposition of the case, if any, is not reported. Furthermore, only one of the magazines in the **Mounce** case, "Paradise," was seized (in the amount of 13 copies) in Rosenbloom's arrest, and the magazine here in issue was published at least six years subsequent to the Supreme Court decision. "Eden" was not considered in the **Mounce** discussion. Had any WIP employee possessed the legal skill to find, read and understand the **Mounce** opinion, he would have remained singularly unenlightened with respect to the Supreme Court's opinion of the legitimacy of the publications which prompted Rosenbloom's arrests. Indeed, the **Mounce** opinion would merely have confirmed that Rosenbloom's claim to Supreme Court approval made to Nate Wright was entirely unfounded in fact.

criminal charges stemming from the arrest and that the police and the District Attorney claimed that Rosenbloom's magazines were obscene. It thus became more reasonable for Wright to have doubted the truth of Rosenbloom's statement, really a confirmation of WIP's original belief in the accuracy of its prior publication. On this basis, Wright was justified in terminating the conversation. In any event, Wright's conduct seems irrelevant in determining whether WIP's earlier newscasts were made with a "high degree of awareness" of their probable falsity.[21]

Nor are the alleged investigatory failures of WIP sufficient to support a finding of reckless disregard for the truth. In the **New York Times** case, this Court pointed out that the presence in the Times' files of news stories indicating the falseness of the defamatory advertisement at issue did not establish that the Times "knew" the advertisement to be false. The Court further pointed out that "* * * the state of mind required for actual malice would have to be brought home to the persons * * * having responsibility for the publication of the advertisement." 376 U. S. at 287. Thus, "failure to investigate does not in itself establish bad faith." **St. Amant v. Thompson**, 390 U. S. at 733. See **Beckley Newspapers v. Hanks**, 389 U. S. at 84-85.

In **Beckley Newspapers v. Hanks**, there was testimony on the record that defamatory editorials were written by employees of the defendant merely because "there was cause on their part to feel there was that possibility." 389 U. S.

21. Further, since the broadcast which Rosenbloom asked Wright to read to him did not refer to Rosenbloom by name, Wright might reasonably have doubted that any retraction was necessary, even assuming one had been requested. This precise point was noted by the Supreme Court in the **New York Times** case. There, after questioning whether failure to retract could ever be evidence of malice for constitutional purposes, the Court held that failure to retract was not such evidence in that case because the Times reasonably doubted whether the advertisement involved could reasonably be taken as referring to the respondent. 376 U. S. at 286.

at 84. Nonetheless, the Court held this to be insufficient to establish the high degree of awareness of probable falsity necessary for a finding of actual malice.

In the present case, WIP did not depend on the mere "possibility" that its statements were accurate, but instead relied on established sources. Any attempt to show that the sources utilized by WIP were so questionable that reliance on them would provide the basis for a finding of actual malice would have to be supported on the record by positive evidence of untrustworthiness or previous bad experiences by the respondent. **St. Amant v. Thompson**, 390 U. S. at 733. Not only did plaintiff fail to carry its burden of proof in this regard, but the record affirmatively shows that the sources relied on by WIP indeed had past records of reliability (293a-294a).

First, the characterization of the magazine as obscene came to WIP from Captain Ferguson, a 48 year veteran of the Philadelphia Police Force, who had participated in investigating alleged obscenity law violations for more than 40 years, and, according to Rosenbloom's description of Nate Wright's conversation, from the District Attorney.[22]

WIP, over the years, had frequently relied on Captain Ferguson as a source and had found him reliable, as had other Philadelphia news media. The arrests here involved

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22. WIP had no reason to question the information received from Ferguson and the District Attorney, even assuming that these two sources presented only one side of the problem. As the Court of Appeals for the Fifth Circuit stated in **New York Times v. Connor**, 365 F. 2d 567, 576 (1966):

> "* * * a reporter without a 'high degree of awareness of their probable falsity,' may rely on statements made by a single source even though they reflect only one side of the story without fear of libel prosecution * * *."

Although, on cross-examination, Captain Ferguson's views on obscenity law were revealed to be relatively unsophisticated, WIP could hardly be charged with knowledge of this at the time Ferguson made his reports to the station.

were authorized by the Police Commissioner and Captain Ferguson was authorized by the Police Commissioner to issue releases to the news media (259a, 262a). In this very matter, the Philadelphia Bulletin, the Philadelphia Inquirer, WCAU-TV and the wire services had already used the same information from Ferguson with respect to Rosenbloom. It is difficult to imagine how WIP's reliance on Ferguson in this case could be characterized as "reckless disregard" or even as proof of an inadequate investigation.

Paul Rust, WIP's news manager, was unable to identify the actual source of the first broadcast in the second series, which took place almost five years before the trial. He testified that the station usually checked with the District Attorney's office on legal proceedings and, in fact, a check was made as to one broadcast with the judge in charge of the case. Beyond this, the record shows, as stated above, that WIP relied on Captain Ferguson and the District Attorney, either of whom would presumably be more qualified to investigate the legal nature of the publications than a newspaper or radio station would be. The record in no way supports the conclusion that WIP acted with "reckless disregard of the truth by failure to investigate" or even deviated from a reasonable newspaperman's standard of care. The burden of proof with respect to "actual malice" is, of course, on the plaintiff. **New York Times**, at 284.

The Court of Appeals rejected the trial court's conclusion that the "inflammatory" language of WIP's second series of broadcasts provided an intrinsic proof of reckless disregard of the truth. The Court in the **New York Times** case did not consider the charges there involved, which were at least as "inflammatory" as the ones in the present case, as evidence of actual malice or reckless disregard of the truth. See **Garrison v. Louisiana**, 379 U. S. at 74; **Washington Post Co. v. Keough**, 365 F. 2d 965, 970 (D. C. Cir. 1966). Rosenbloom's lawsuit was characterized by WIP

as being an action to enjoin law enforcement officers from arresting and prosecuting Rosenbloom, and to enjoin the defendant news media from characterizing the magazine as "smut and obscenity." In capsulizing the report of the lawsuit for a brief broadcast, WIP summed it up as a suit ordering the defendants "to lay off the smut literature racket." Accepting the known view of the Police Department and of the District Attorney, and in the light of the allegation in Rosenbloom's complaint (406a-407a), this was, in essence, a not unreasonable interpretation of the purpose of the lawsuit couched in non-legal language. Even at common law press reports of official or legal proceedings are normally not overly proscribed.[23]

In evaluating WIP's investigatory duty, it is important to note that the station was presenting fast-breaking news stories. In this context, it is hard to imagine how WIP realistically could be expected to make the kind of investigation which petitioner suggests. To permit a finding of actual malice on this record would substantially impede the ability of radio stations to perform a vital function in the broadcasting of "hot news."

Although, as petitioner points out, WIP did not broadcast a news report concerning Rosenbloom's lawsuit until the day of the first hearing, five days after the complaint was filed, there is no indication that WIP was aware of the story from the moment the complaint was filed in the District Court, or that it was worthy of any real interest, at least to laymen, before court proceedings commenced. In any event, WIP's references to the lawsuit, like all its

23. "Mere exaggeration, slight irony, or wit, or all those delightful touches of style which go to make an article readable, do not push beyond the limitations of fair comment. Facts do not cease to be facts because they are mixed with the fair and expectant comment of the story teller, who adds to the recital a little touch by his piquant pen." **Briarcliff L. Hotel v. C.-S.-Publishers**, 260 N. Y. 106, 118 (1932), 183 N. E. 193, 198, reargument den., 261 N. Y. 537, 185 N. E. 728.

arrest references to Rosenbloom, were part of newscasts ranging from 90 seconds to 10 minutes in length, and which contained as many as 18 separate items (350a-401a). In these circumstances, extensive investigation of a single news item—for example, by obtaining and subjecting to legal analysis magazines and court records—is impractical; it would be a great deal easier for the station simply to omit the story from the newscast, thereby depriving the public of access to the news. This case is nothing like the situation in, *e.g.*, **Butts**, where a lengthy feature article which required months of preparation was involved.

Rosenbloom now argues that the Court of Appeals erred in concluding that his evidence of "actual malice," even if inadequate considered *seriatim*, did not in total provide support for the jury verdict. The Court of Appeals properly evaluated the evidence separately to determine the constitutional sufficiency of each item, following the example set in **New York Times.** 376 U. S. at 286-292. In **St. Amant v. Thompson**, plaintiff maintained the defendant had published with no personal knowledge of the facts; relied solely on the affidavit of a source whose veracity was undisclosed by the record; failed to verify with individuals who might have known the facts; proceeded regardless of whether the published statements were defamatory, without considering the consequences; and published believing that there would be no responsibility for the broadcast because it merely restated the views of the source. The Court there held that a jury finding of actual malice could not be supported on the record.

In light of proper analysis of the facts and the controlling constitutional requirements, it is submitted that there is no evidence establishing the requisite "convincing clarity" that WIP acted with reckless disregard of the truth, and the Court of Appeals' holding should be affirmed.

CONCLUSION.

For the reasons set forth above, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

SCHNADER, HARRISON, SEGAL & LEWIS,
1719 Packard Building,
Philadelphia, Pa. 19102

COUDERT BROTHERS,
200 Park Avenue,
New York, N. Y. 10017
Of Counsel.

BERNARD G. SEGAL,
IRVING R. SEGAL,
SAMUEL D. SLADE,
PETER S. GREENBERG,

CARLETON G. ELDRIDGE, JR.,
Attorneys for Respondent.

May 8, 1970.

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ROSENBLOOM *v.* METROMEDIA, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 66. Argued December 7–8, 1970—Decided June 7, 1971

Respondent's radio station, which broadcast news reports every half hour, broadcast news stories of petitioner's arrest for possession of obscene literature and the police seizure of "obscene books," and stories concerning petitioner's lawsuit against certain officials alleging that the magazines he distributed were not obscene and seeking injunctive relief from police interference with his business. These latter stories did not mention petitioner's name, but used the terms "smut literature racket" and "girlie-book peddlers." Following petitioner's acquittal of criminal obscenity charges, he filed this diversity action in District Court seeking damages under Pennsylvania's libel law. The jury found for petitioner and awarded $25,000 in general damages; and $725,000 in punitive damages, which was reduced by the court on remittitur to $250,000. The Court of Appeals reversed, holding that the *New York Times Co.* v. *Sullivan*, 376 U. S. 254, standard applied, and "the fact that plaintiff was not a public figure cannot be accorded decisive significance." *Held:* The judgment is affirmed. Pp. 11––.

415 F. 2d 892, affirmed.

MR. JUSTICE BRENNAN, joined by THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN, concluded that the *New York Times* standard of knowing or reckless falsity applies in a state civil libel action brought by a private individual for a defamatory falsehood uttered in a radio news broadcast about the individual's involvement in an event of public or general interest. Pp. 11–27.

MR. JUSTICE BLACK in a separate opinion concluded that the First Amendment protects the news media from libel judgments even when statements are made with knowledge that they are false. P. 1.

Syllabus

MR. JUSTICE WHITE concluded that, in the absence of actual malice as defined in *New York Times, supra*, the First Amendment gives the news media a privilege to report and comment upon the official actions of public servants in full detail, without sparing from public view the reputation or privacy of an individual involved in or affected by any official action. Pp. 2–5.

BRENNAN, J., announced the Court's judgment and delivered an opinion in which BURGER, C. J., and BLACKMUN, J., joined. BLACK, J., filed an opinion concurring in the judgment. WHITE, J., filed an opinion concurring in the judgment. HARLAN, J., filed a dissenting opinion. MARSHALL, J., filed a dissenting opinion in which STEWART, J., joined. DOUGLAS, J., took no part in the consideration or decision of this case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 66.—October Term, 1970

George A. Rosenbloom, Petitioner, v. Metromedia, Inc. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[June 7, 1971]

Mr. Justice Brennan announced the judgment of the Court and an opinion in which The Chief Justice and Mr. Justice Blackmun join.

In a series of cases beginning with *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), the Court has considered the limitations upon state libel laws imposed by the constitutional guarantees of freedom of speech and of the press. *New York Times* held that in a civil libel action by a public official against a newspaper those guarantees required clear and convincing proof that a defamatory falsehood alleged as libel was uttered with "knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 280. The same requirement was later held to apply to "public figures" who sued in libel on the basis of alleged defamatory falsehoods. The several cases considered since *New York Times* involved actions of "public officials" or "public figures," usually, but not always, against newspapers or magazines.[1] Common to all the cases was a

[1] See, *e. g.*, *Associated Press* v. *Walker*, 388 U. S. 130 (1967) (retired Army general against a wire service); *Curtis Pub. Co.* v. *Butts*, 388 U. S. 130 (1967) (former football coach against publisher of magazine); *Beckley Newspaper Corp.* v. *Hanks*, 389 U. S. 81 (1967) (court clerk against newspaper); *Greenbelt Pub. Assn.* v. *Bresler*, 398 U. S. 6 (1970) (state representative and real estate

defamatory falsehood in the report of an event of "public or general interest." [2] The instant case presents the question whether the *New York Times'* knowing or reckless falsity standard applies in a state civil libel action brought not by a "public official" or a "public figure" but by a private individual for a defamatory falsehood uttered in a news broadcast by a radio station about the individual's involvement in an event of public or general interest.[3] The District Court for the Eastern District

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developer against publisher of newspaper); *Ocala Star-Banner Company* v. *Damron*, — U. S. — (1971) (defeated candidate for tax assessor against publisher of newspaper); *Monitor Patriot Co.* v. *Roy*, — U. S. — (1971) (candidate for United States Senate against publisher of newspaper); *Time, Inc.* v. *Pape*, — U. S. — (1971) (police official against publisher of magazine). However, *Rosenblatt* v. *Baer*, 383 U. S. 75 (1966), involved an action against a newspaper columnist by a former county recreation area supervisor; *St. Amant* v. *Thompson*, 390 U. S. 727 (1968), involved an action of a deputy sheriff against a defeated candidate for the United States Senate; and *Linn* v. *Plant Guard Workers*, 383 U. S. 53 (1966), involved an action by an official of an employer against a labor union.

Garrison v. *Louisiana*, 379 U. S. 64 (1964), held that the *New York Times* standard measured also the constitutional restriction upon state power to impose criminal sanctions for criticism of the official conduct of public officials. The *Times* standard of proof has also been required to support the dismissal of a public school teacher based on false statements made by the teacher in discussing issues of public importance. *Pickering* v. *Board of Education*, 391 U. S. 563 (1968). The same test was applied to suits for invasion of privacy based on false statements where, again, a matter of public interest was involved. *Time, Inc.* v. *Hill*, 385 U. S. 374 (1967). The opinion in that case expressly reserved the question presented here whether the test applied in a libel action brought by a private individual. *Id.*, at 391.

[2] This term is from Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 214 (1890). Our discussion of matters of "public or general interest" appears in Part IV, *infra*, of this opinion.

[3] Petitioner does not question that the First Amendment guarantees of freedom of speech and freedom of the press apply to respondent's newscasts.

of Pennsylvania held that the *New York Times* standard did not apply and that Pennsylvania law determined respondent's liability in this diversity case, 289 F. Supp. 737 (1968). The Court of Appeals for the Third Circuit held that the *New York Times* standard did apply and reversed the judgment for damages awarded to petitioner by the jury. 415 F. 2d 892 (1969). We granted certiorari, 397 U. S. 904 (1970). We agree with the Court of Appeals and affirm that court's judgment.

I

In 1963, petitioner was a distributor of nudist magazines in the Philadelphia metropolitan area. During the fall of that year, in response to citizen complaints, the Special Investigations Squad of the Philadelphia Police Department initiated a series of enforcement actions under the city's obscenity laws. The police, under the command of Captain Ferguson, purchased various magazines from more than 20 newsstands throughout the city. Based upon Captain Ferguson's determination that the magazines were obscene,[4] police on October 1, 1963, arrested most of the newsstand operators[5] on charges of selling obscene material. While the police were making an arrest at one newsstand, petitioner arrived to deliver some of his nudist magazines and was immediately arrested along with the newsboy.[6] Three days later, on October 4, the police obtained a warrant to search petitioner's home and the rented barn he used as a warehouse, and seized the inventory of magazines and books found

[4] At trial, Captain Ferguson testified that his definition of obscenity was "anytime the private parts is showing of the female or the private parts is shown of males."

[5] Several more newsstand operators were arrested between October 1 and October 4.

[6] The record neither confirms nor refutes petitioner's contention that his arrest was fortuitous. Nor does the record reflect whether or not petitioner's magazines were the subject either of the original citizens' complaints or of the initial police purchases.

at these locations. Upon learning of the seizures, petitioner, who had been released on bail after his first arrest, surrendered to the police and was arrested for a second time.

Following the second arrest, Captain Ferguson telephoned respondent's radio station *WIP* and another local radio station, a wire service, and a local newspaper to inform them of the raid on petitioner's home and of his arrest. *WIP* broadcast news reports every half hour to the Philadelphia metropolitan area. These news programs ran either five or ten minutes and generally contained from six to twenty different items that averaged about thirty seconds each. *WIP*'s 6 p. m. broadcast on October 4, 1963, included the following item:

> "City Cracks Down on Smut Merchants
>
> "The Special Investigations Squad raided the home of George Rosenbloom in the 1800 block of Vesta Street this afternoon. Police confiscated 1,000 allegedly obscene books at Rosenbloom's home and arrested him on charges of possession of obscene literature. The Special Investigations Squad also raided a barn in the 20 hundred block of Welsh Road near Bustleton Avenue and confiscated 3,000 obscene books. Capt. Ferguson says he believes they have hit the supply of a main distributor of obscene material in Philadelphia."

This report was re-broadcast in substantially the same form at 6:30 p. m., but at 8 p. m. when the item was broadcast for the third time, *WIP* corrected the third sentence to read "reportedly obscene." News of petitioner's arrest was broadcast five more times in the following twelve hours, but each report described the seized books as "allegedly" or "reportedly" obscene. From October 5 to October 21, *WIP* broadcast no further reports relating to petitioner.

On October 16 petitioner brought an action in Federal District Court against various city and police officials

and against several local news media.[7] The suit alleged that the magazines petitioner distributed were not obscene and sought injunctive relief prohibiting further police interference with his business as well as further publicity of the earlier arrests. The second series of allegedly defamatory broadcasts related to *WIP*'s news reports of the law suit. There were ten broadcasts on October 21, two on October 25, and one on November 1. None mentioned petitioner by name. The first at 6:30 a. m. on October 21 was pretty much like those that followed:

> "Federal District Judge Lord, will hear arguments today from two publishers and a distributor all seeking an injunction against Philadelphia Police Commissioner Howard Leary . . . District Attorney James C. Crumlish . . . a local television station and a newspaper . . . ordering them to lay off the smut literature racket.
>
> "The girlie-book peddlers say the police crackdown and continued reference to their borderline literature as smut or filth is hurting their business. Judge Lord refused to issue a temporary injunction when he was first approached. Today he'll decide the issue. It will set a precedent . . . and if the injunction is not granted . . . it could signal an even more intense effort to rid the city of pornography."

On October 27, petitioner went to *WIP*'s studios after hearing from a friend that the station had broadcast news about his lawsuit. Using a lobby telephone to talk with a part-time newscaster, petitioner inquired what stories

[7] The complaint named as defendants the publishers of two newspapers, a television station, the city of Philadelphia, and the district attorney, but not respondent *WIP*. The plaintiffs were petitioner, the partnership of himself and his wife which carried on the business, and the publisher of the nudist magazines which he distributed.

WIP had broadcast about him. The newscaster asked him to be more specific about dates and times. Petitioner then asked for the noon news broadcast on October 21, 1963, which the newscaster read to him over the phone; it was similar to the above 6:30 a. m. broadcast. According to petitioner, the ensuing interchange was brief. Petitioner told the newscaster that his magazines were "found to be completely legal and legitimate by the United States Supreme Court." When the newscaster replied the district attorney had said the magazines were obscene, petitioner countered that he had a public statement of the district attorney declaring the magazines legal. At that point, petitioner testified, "the telephone conversation was terminated—he just hung up." Petitioner apparently made no request for a retraction or correction, and none was forthcoming. *WIP*'s final report on petitioner's lawsuit—the only one after petitioner's unsatisfactory conversation at the station—occurred on November 1 after the station had checked the story with the judge involved.[8]

II

In May 1964 a jury acquitted petitioner in state court of the criminal obscenity charges under instructions of the trial judge that, as a matter of law, the nudist magazines distributed by petitioner were not obscene. Following his acquittal, petitioner filed this diversity action

[8] The text of the final broadcast read as follows:

"U. S. District Judge John Lord told WIP news just before airtime that it may be another week before he will be able to render a decision as to whether he has jurisdiction in the case of two publishers and a distributor who wish to restrain the D. A.'s office, the police chief, a TV station and the Bulletin for either making alleged raids of their publications, considered smut and immoral literature by the defendants named, or publicizing that they are in that category. Judge Lord then will be in a position to rule on injunction proceedings asked by the publishers and distributor claiming the loss of business in their operations."

in District Court seeking damages under Pennsylvania's libel law. Petitioner alleged that *WIP*'s unqualified characterization of the books seized as "obscene" in the 6 and 6:30 p. m. broadcasts of October 4, describing his arrest, constituted libel *per se* and was proved false by petitioner's subsequent acquittal. In addition, he alleged that the broadcasts in the second series describing his court suit for injunctive relief were also false and defamatory in that *WIP* characterized petitioner and his business associates as "smut distributors" and "girlie book peddlers" and, further, falsely characterized the suit as an attempt to force the defendants "to lay off the smut literature racket."

At the trial *WIP*'s defenses were truth and privilege. *WIP*'s news director testified that his eight-man staff of reporters prepared their own newscasts and broadcast their material themselves, and that material for the news programs usually came either from the wire services or from telephone tips. None of the writers or broadcasters involved in preparing the broadcasts in this case testified. The news director's recollection was that the primary source of information for the first series of broadcasts about petitioner's arrest was Captain Ferguson, but that, to the director's knowledge, the station did not have any further verification. Captain Ferguson testified that he had informed *WIP* and other media of the police action and that *WIP* had accurately broadcast what he told the station. The evidence regarding *WIP*'s investigation of petitioner's law suit in the second series of broadcasts was even more sparse. The news director testified that he was "sure we would check with the District Attorney's office also and with the police department," but "it would be difficult to state what additional corroboration we had." In general, he testified that *WIP*'s half-hour deadlines required it to rely on wire-service copy and oral reports from previously reliable sources subject to the

general policy that "we will contact as many sources as we possibly can on any kind of story."

III

Pennsylvania's libel law tracks almost precisely the Restatement (First) of Torts provisions on the subject. Pennsylvania holds actionable any unprivileged "malicious" [9] publication of matter which tends to harm a person's reputation and expose him to public hatred, contempt or ridicule. *Schnabel* v. *Meredith*, 378 Pa. 609, 107 A. 2d 860 (1954); Restatement of Torts §§ 558, 559. Pennsylvania law recognizes truth as a complete defense to a libel action. *Schonek* v. *WJAC, Inc.*, 436 Pa. 78, 84, 258 A. 2d 504, 507 (1969); Restatement of Torts § 582. It recognizes an absolute immunity for defamatory statements made by high state officials, even if published with an improper motive, actual malice, or knowing falsity. *Montgomery* v. *Philadelphia*, 392 Pa. 178, 140 A. 2d 100 (1958); Restatement of Torts § 591; and it recognizes a conditional privilege for news media to report judicial, administrative, or legislative proceedings if the account is fair and accurate, and not published solely for the purpose of causing harm to the person defamed, even though the official information is false or inaccurate. *Sciandra* v. *Lynett*, 409 Pa. 595, 187 A. 2d 586, 588–589 (1963); Restatement of Torts § 611. The conditional privilege of the news media may be defeated, however, by " 'want of reasonable care and diligence to ascertain the truth, before giving currency to an untrue communication.' The failure to employ such 'reasonable care and diligence' can destroy a privilege which otherwise would protect the utterer of the communication." *Purcell* v. *Westinghouse Broadcasting Co.*, 411 Pa. 167, 179, 191 A. 2d 662, 668

[9] The reference here, of course, is to common law "malice," not to the constitutional standard of *New York Times* v. *Sullivan*, *supra*. See n. 18, *post*.

(1963). Pennsylvania has also enacted verbatim the Restatement's provisions on burden of proof, which place the burden of proof for the affirmative defenses of truth and privilege upon the defendant.[10]

At the close of the evidence, the District Court denied respondent's motion for a directed verdict and charged the jury, in conformity with Pennsylvania law, that four findings were necessary to return a verdict for petitioner: (1) that one or more of the broadcasts were defamatory; (2) that a reasonable listener would conclude that the defamatory statement referred to petitioner; (3) that *WIP* had forfeited its privilege to report official proceedings fairly and accurately, either because it intended to injure the plaintiff personally or because it exercised the privilege unreasonably and without reasonable care; and (4) that the reporting was false. The jury was instructed that petitioner had the burden of proof on the first three issues, but that respondent had the burden of proving that the reporting was true. The jury was

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[10] 12 Purdon's Pa. Stat. Ann. § 1584a (Supp. 1971) provides:

"(1) In an action for defamation, the plaintiff has the burden of proving, when the issue is properly raised:

"(a) The defamatory character of the communication;

"(b) Its publication by the defendant;

"(c) Its application to the plaintiff;

"(d) The recipient's understanding of its defamatory meaning;

"(e) The recipient's understanding of it as intended to be applied to the plaintiff;

"(f) Special harm resulting to the plaintiff from its publication;

"(g) Abuse of a conditionally privileged occasion.

"(2) In an action for defamation, the defendant has the burden of proving, when the issue is properly raised:

"(a) The truth of the defamatory communication;

"(b) The privileged character of the occasion on which it was published;

"(c) The character of the subject matter of defamatory comment as of public concern."

See Restatement of Torts § 613.

further instructed that "as a matter of law" petitioner was not entitled to actual damages claimed for loss of business "not because it wouldn't ordinarily be but because there has been evidence that this same subject matter was the subject" of broadcasts over other television and radio stations and of newspaper reports, "so if there was any business lost . . . we have no proof . . . that [it] resulted directly from the broadcasts by WIP . . . ." App., at 331a. On the question of punitive damages, the judge gave the following instruction:

> "if you find that this publication arose from a bad motive or malice toward the plaintiff, or if you find that it was published with reckless indifference to the truth, if you find that it was not true, you would be entitled to award punitive damages, and punitive damages are awarded as a deterrent from future conduct of the same sort.
>
> "They really are awarded for outrageous conduct, as I have said, with a bad motive or with reckless disregard of the interests of others, and before you would award punitive damages you must find that these broadcasts were published with a bad motive or with reckless disregard of the rights of others, or reckless indifference to the rights of others . . . ."

The jury returned a verdict for petitioner and awarded $25,000 in general damages, and $725,000 in punitive damages. The District Court reduced the punitive damages award to $250,000 on remittitur, but denied respondent's motion for judgment n. o. v. In reversing, the Court of Appeals emphasized that the broadcasts concerned matters of public interest and that they involved "hot news" prepared under deadline pressure. The Court of Appeals concluded that "the fact that plaintiff was not a public figure cannot be accorded decisive significance if the recognized important guarantees of the First Amendment are to be adequately imple-

mented." 415 F. 2d, at 896. For that reason, the court held that the *New York Times* standard applied and, further, directed that judgment be entered for respondent, holding that, as a matter of law, petitioner's evidence did not meet that standard.

IV

Petitioner concedes that the police campaign to enforce the obscenity laws was an issue of public interest, and, therefore, that the constitutional guarantees for freedom of speech and press imposed limits upon Pennsylvania's power to apply its libel laws to compel respondent to compensate him in damages for the alleged defamatory falsehoods broadcast about his involvement. As noted, the narrow question he raises is whether, because he is not a "public official" or a "public figure" but a private individual, those limits required that he prove that the falsehoods resulted from a failure of respondent to exercise reasonable care, or required that he prove that the falsehoods were broadcast with knowledge of their falsity or with reckless disregard of whether they were false or not. That question must be answered against the background of the functions of the constitutional guarantees for freedom of expression. *Rosenblatt* v. *Baer*, 383 U. S. 75, at 84–85, n. 10 (1966).

Self-governance in the United States presupposes far more than knowledge and debate about the strictly official activities of various levels of government. The commitment of the country to the institution of private property, protected by the Due Process and Just Compensation Clauses in the Constitution, places in private hands vast areas of economic and social power that vitally affect the nature and quality of life in the Nation. Our efforts to live and work together in a free society not completely dominated by governmental regulation necessarily encompass far more than politics in a narrow

sense. "The guarantees for speech and press are not the preserve of political expression or comment upon public affairs." *Time, Inc.* v. *Hill,* 385 U. S., at 388. "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama,* 310 U. S. 88, 102 (1941).

Although the limitations upon civil libel actions, first held in *New York Times* to be required by the First Amendment, were applied in that case in the context of defamatory falsehoods about the official conduct of a public official, later decisions have disclosed the artificiality, in terms of the public's interest, of a simple distinction between "public" and "private" individuals or institutions:

> "Increasingly in this country, the distinctions between governmental and private sectors are blurred. . . . In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government. This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions . . . .
>
> ". . . Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials.'" *Curtis Publishing Co.* v. *Butts,* 388 U. S., at 163–164 (concurring opinion of Warren, C. J.).

Moreover, the constitutional protection was not intended to be limited to matters bearing broadly on issues of responsible government. "[T]he Founders . . . felt that a free press would advance 'truth, science, morality, and arts in general' as well as responsible government." *Curtis Publishing Co.* v. *Butts,* 388 U. S., at 147 (opinion of HARLAN, J.). Comments in other cases reiterate this judgment that the First Amendment extends to myriad matters of public interest. In *Time, Inc.* v. *Hill, supra,* we had "no doubt that the . . . opening of a new play linked to an actual incident, is a matter of public interest," 385 U. S., at 388, which was entitled to constitutional protection. *Butts* held that an alleged "fix" of a college football game was a public issue. *Associated Press* v. *Walker,* a companion case to *Butts,* established that the public had a similar interest in the events and personalities involved in federal efforts to enforce a court decree ordering the enrollment of a Negro student in the University of Mississippi. Thus, these cases underscore the vitality, as well as the scope, of the "profound national commitment to the principle that debate on *public issues* should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan,* 376 U. S., at 270–271 (emphasis added).

If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not "voluntarily" choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety.[11] The

[11] For example, the public's interest in the provocative speech that was made during the tense episode on the campus of the University of Mississippi would certainly have been the same in *Associated Press* v. *Walker,* n. 1, *supra,* if the speaker had been an

present case illustrates the point. The community has a vital interest in the proper enforcement of its criminal laws, particularly in an area such as obscenity where a number of highly important values are potentially in conflict: the public has an interest both in seeing that the criminal law is adequately enforced and in assuring that the law is not used unconstitutionally to suppress free expression. Whether the person involved is a famous large scale magazine distributor or a "private" businessman running a corner newsstand has no relevance in ascertaining whether the public has an interest in the issue. We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.[12]

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anonymous student and not a well-known retired Army General. *Walker* also illustrates another anomaly of focusing analysis on the public "figure" or public "official" status of the individual involved. General Walker's fame stemmed from events completely unconnected with the episode in Mississippi. It seems particularly unsatisfactory to determine the extent of First Amendment protection on the basis of factors completely unrelated to the newsworthy events being reported. See also *Greenbelt Pub. Ass'n* v. *Bresler*, 398 U. S. 6 (1970).

[12] We are not to be understood as implying that no area of a person's activities falls outside the area of public or general interest. We expressly leave open the question of what constitutional standard of proof, if any, controls the enforcement of state libel laws for defamatory falsehoods published or broadcast by news media about a person's activities not within the area of public or general interest.

We also intimate no view on the extent of constitutional protection, if any, for purely commercial communications made in the course of business. See *Valentine* v. *Chrestensen*, 316 U. S. 52 (1942). Compare *Breard* v. *Alexander*, 341 U. S. 622 (1951), with *Martin* v. *Struthers*, 319 U. S. 141 (1943). But see *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 265–266 (1964); *Linn* v. *Local 114, Plant Guard Workers*, 383 U. S. 53 (1966).

Our Brother WHITE agrees that the protection afforded by the First Amendment depends upon whether the issue involved in the publication is an issue of public or general concern. He would, however, confine our holding to the situation raised by the facts in this case, that is, limit it to issues involving "official actions of public servants." In our view that might be misleading. It is clear that there has emerged from our cases decided since *New York Times* the concept that the First Amendment's impact upon state libel laws derives not so much from whether the plaintiff is a "public official," "public figure," or "private individual," as it derives from the question whether the allegedly defamatory publication concerns a matter of public or general interest. See T. Emerson, "The System of Freedom of Expression" 531–532, 540 (1970). In that circumstance we think the time has come forthrightly to announce that the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern, albeit leaving the delineation of the reach of that term to future cases. As our Brother WHITE observes, that is not a problem in this case, since police arrest of a person for distributing allegedly obscene magazines clearly constitutes an issue of public or general interest.[13]

V

We turn then to the question to be decided. Petitioner's argument that the Constitution should be held to require that the private individual prove only that

[13] Our Brother WHITE states in his opinion "The First Amendment gives . . . the privilege to report . . . the official actions of public servants in full detail, with no requirement that . . . the privacy of an individual involved in . . . the official action be spared from public view." *Post*, at —. This seems very broad. It implies a privilege to report, for example such confidential records as those of juvenile court proceedings.

the publisher failed to exercise "reasonable care" in publishing defamatory falsehoods proceeds along two lines. First he argues that the private individual, unlike the public figure, does not have access to the media to counter the defamatory material and that the private individual, unlike the public figure, has not assumed the risk of defamation by thrusting himself into the public arena. Second, petitioner focuses on the important values served by the law of defamation in preventing and redressing attacks upon reputation.

We have recognized the force of petitioner's arguments, *Time, Inc.* v. *Hill, supra,* at 391, and we adhere to the caution expressed in that case against "blind application" of the *New York Times* standard. *Id.*, at 390. Analysis of the particular factors involved, however, convinces us that petitioner's arguments cannot be reconciled with the purposes of the First Amendment, with our cases, and with the traditional doctrines of libel law itself. Drawing a distinction between "public" and "private" figures makes no sense in terms of the First Amendment guarantees.[14] The *New York Times* standard was applied to libel of a public official or public figure to give effect to the Amendment's function to encourage ventilation of public issues, not because the

[14] See *United Medical Laboratories, Inc.* v. *Columbia Broadcasting System, Inc.*, 404 F. 2d 706 (CA9 1968), cert. denied, 394 U. S. 921 (1969); *Time, Inc.* v. *McLaney*, 406 F. 2d 565 (CA5), cert. denied, 395 U. S. 922 (1969); *Bon Air Hotel, Inc.* v. *Time, Inc.*, 426 F. 2d 858, 861 n. 4, and cases cited therein (CA5 1970). See generally Cohen, A New Niche for the Fault Principle: A Forthcoming Newsworthiness Privilege in Libel Cases? 18 U. C. L. A. L. Rev. 371 (1970); Kalven, The Reasonable Man and the First Amendment, 1967 Sup. Ct. Rev. 267; Note, Public Official and Actual Malice Standards: The Evolution of *New York Times Co.* v. *Sullivan*, 56 Iowa L. Rev. 393, 398–400 (1970); Note, The Scope of First Amendment Protection for Good-Faith Defamatory Error, 75 Yale L. J. 642 (1966).

public official has any less interest in protecting his reputation than an individual in private life. While the argument that public figures need less protection because they can command media attention to counter criticism may be true for some very prominent people, even then it is the rare case where the denial overtakes the original charge. Denials, retractions, and corrections are not "hot" news, and rarely receive the prominence of the original story. When the public official or public figure is a minor functionary, or has left the position which put him in the public eye, see *Rosenblatt* v. *Baer, supra,* the argument loses all of its force. In the vast majority of libels involving public officials or public figures, the ability to respond through the media will depend on the same complex factor on which the ability of a private individual depends: the unpredictable event of the media's continuing interest in the story. Thus the unproven, and highly improbable, generalization that an as yet undefined class of "public figures" involved in matters of public concern will be better able to respond through the media than private individuals also involved in such matters seems too insubstantial a reed on which to rest a constitutional distinction. Furthermore, in First Amendment terms, the cure seems far worse than the disease. If the States fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of ensuring their ability to respond, rather than in stifling public discussion of matters of public concern.[15]

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[15] Some States have adopted retraction statutes or right of reply statutes. See Donnelly, The Right of Reply: An Alternative to an Action for Libel, 34 Va. L. Rev. 867 (1948); Note, Vindication of the Reputation of a Public Official, 80 Harv. L. Rev. 1730 (1967). Cf. *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367 (1969).

One writer, in arguing that the First Amendment itself should be read to guarantee a right of access to the media not limited to a

Further reflection over the years since *New York Times* was decided persuades us that the view of the "public official" or "public figure" as assuming the risk of defamation by voluntarily thrusting himself into the public eye bears little relationship either to the values protected by the First Amendment or to the nature of our society. We have recognized that "[e]xposure of the self to others in varying degrees is a concomitant of life in a civilized community." *Time, Inc.* v. *Hill*, 385 U. S. 374, 388 (1967). Voluntarily or not, we are all "public" men to some degree. Conversely, some aspects of the lives of even the most public men fall outside the area of matters of public or general concern. See n. 12, *supra; Griswold* v. *Connecticut*, 381 U. S. 479 (1965).[16] Thus, the idea that certain "public" figures have voluntarily exposed their entire lives to public inspection, while private individuals have kept theirs carefully shrouded from public view is, at best, a legal fiction. In any event, such a distinction could easily produce the paradoxical result of dampening discussion of issues

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right to respond to defamatory falsehoods, has suggested several ways the law might encourage public discussion. Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641, 1666–1678 (1967). It is important to recognize that the private individual often desires press exposure either for himself, his ideas, or his causes. Constitutional adjudication must take into account the individual's interest in access to the press as well as the individual's interest in preserving his reputation, even though libel actions by their nature encourage a narrow view of the individual's interest since they focus only on situations where the individual has been harmed by undesired press attention. A constitutional rule that deters the press from covering the ideas or activities of the private individual thus conceives the individual's interest too narrowly.

[16] This is not the less true because the area of public concern in the cases of candidates for public office and of elected public officials is broad. See *Monitor Patriot Company* v. *Roy*, — U. S. — (1971).

of public or general concern because they happen to involve private citizens while extending constitutional encouragement to discussion of aspects of the lives of "public figures" which are not in the area of public or general concern.

General references to the values protected by the law of libel conceal important distinctions. Traditional arguments suggest that libel law protects two separate interests of the individual: first, his desire to preserve a certain privacy around his personality from unwarranted intrusion, and, second a desire to preserve his public good name and reputation. See *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (concurring opinion of STEWART, J.). The individual's interest in privacy—in preventing unwarranted intrusion upon the private aspects of his life—is not involved in this case, or even in the class of cases under consideration, since, by hypothesis, the individual is involved in matters of public or general concern.[17] In the present case, however, petitioner's business reputation is involved, and thus the

[17] Our Brothers HARLAN and MARSHALL would not limit the application of the First Amendment to private libels involving issues of general or public interest. They would hold that the Amendment covers all private libels at least where state law permits the defense of truth. The Court has not yet had occasion to consider the impact of the First Amendment on the application of state libel laws to libels where no issue of general or public interest is involved. See n. 1, *supra*. However, *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), recognized a constitutional right to privacy and at least one commentator has discussed the relation of that right to the First Amendment. T. Emerson, *supra*, 544–562. Since all agree that this case involves an issue of public or general interest, we have no occasion to discuss that relationship. See n. 12, *supra*. We do not, however, share the doubts of our Brothers HARLAN and MARSHALL that courts would be unable to identify interests in privacy and dignity. The task may be difficult but not more so than other tasks in this field.

relevant interests protected by state libel law are petitioner's public reputation and good name.

These are important interests. Consonant with the libel laws of most of the States, however, Pennsylvania's libel law subordinates these interests of the individual in a number of circumstances. Thus, high government officials are immune from liability—absolutely privileged—even if they publish defamatory material from an improper motive, with actual malice, and with knowledge of its falsity. *Montgomery* v. *Philadelphia*, 392 Pa. 178, 140 A. 2d 100 (1958). This absolute privilege attaches to judges, attorneys at law in connection with a judicial proceeding, parties and witnesses to judicial proceedings, Congressmen and state legislators, and high national and state executive officials. Restatement of Torts §§ 585–592. Moreover, a conditional privilege allows newspapers to report the false defamatory material originally published under the absolute privileges listed above, if done accurately. *Sciandra* v. *Lynett*, 409 Pa. 595, 187 A. 2d 586 (1963).

Even without the presence of a specific constitutional command, therefore, Pennsylvania libel law recognizes that society's interest in protecting individual reputation often yields to other important social goals. In this case, the vital needs of freedom of the press and freedom of speech persuade us that allowing private citizens to obtain damage judgments on the basis of a jury determination that a publisher probably failed to use reasonable care would not provide adequate "breathing space" for these great freedoms. Reasonable care is an "elusive standard" which "would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait." *Time, Inc.* v. *Hill*, *supra*, 385 U. S., at 389. Fear of guessing wrong must inevitably cause self-censorship and thus create the danger that the legitimate utterance will be

deterred. Cf. *Speiser* v. *Randall*, 357 U. S. 513, 526 (1958).

Moreover, we ordinarily decide civil litigation by the preponderance of the evidence. Indeed, the judge instructed the jury to decide the present case on that standard. In the normal civil suit where this standard is employed, "we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor." *In re Winship*, 397 U. S. 358, 371 (1970) (concurring opinion of HARLAN, J.). In libel cases, however, we view an erroneous verdict for the plaintiff as most serious. Not only does it mulct the defendant for an innocent misstatement—the three-quarter-million-dollar jury verdict in this case could rest on such an error—but the possibility of such error, even beyond the vagueness of the negligence standard itself, would create a strong impetus toward self-censorship, which the First Amendment cannot tolerate. These dangers for freedom of speech and press led us to reject the reasonable-man standard of liability as "simply inconsistent" with our national commitment under the First Amendment when sought to be applied to the conduct of a political campaign. *Monitor Patriot Co.* v. *Roy*, — U. S. —, — (1971). The same considerations lead us to reject that standard here.

We are aware that the press has, on occasion, grossly abused the freedom it is given by the Constitution. All must deplore such excesses. In an ideal world, the responsibility of the press would match the freedom and public trust given it. But from the earliest days of our history, this free society, dependent as it is for its survival upon a vigorous free press, has tolerated some abuse. In 1799, James Madison wrote:

> "'Among those principles deemed sacred in America, among those sacred rights considered as forming

> the bulwark of their liberty, which the Government contemplates with awful reverence and would approach only with the most cautious circumspection, there is no one of which the importance is more deeply impressed on the public mind than the liberty of the press. That this *liberty* is often carried to excess; that it has sometimes degenerated into *licentiousness*, is seen and lamented, *but the remedy has not yet been discovered. Perhaps it is an evil inseparable from the good with which it is allied; perhaps it is a shoot which cannot be stripped from the stalk without wounding vitally the plant from which it is torn. However desirable those measures might be which might correct without enslaving the press, they have never yet been devised in America.'*" VI Writings of James Madison, 1790–1802, 336 (Hunt ed. 1906) (quoting a memorial to a French minister) (emphasis in original).

This Court has recognized this imperative: "[T]o insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones." *St. Amant* v. *Thompson*, 390 U. S. 727, 732 (1968). We thus hold that a libel action, as here, by a private individual against a licensed radio station for a defamatory falsehood in a newscast relating to his involvement in an event of public or general concern may be sustained only upon clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether it was false or not.[18]

[18] At oral argument petitioner argued that "the little man can't show actual malice. How can George Rosenbloom show that there was actual malice in Metromedia? They never heard of him before." Transcript of oral argument 39. But ill will toward the plantiff, or bad motive, are not elements of the *New York Times* standard. That standard requires only that the plantiff prove knowing or reck-

Calculated falsehood, of course, falls outside "the fruitful exercise of the right of free speech." *Garrison* v. *Louisiana*, 379 U. S. 64, 75 (1964).

Our Brothers HARLAN and MARSHALL reject the knowing or reckless falsehood standard in favor of a test which would require, at least, that the person defamed establish that the publisher negligently failed to ascertain the truth of his story; they would also limit any recovery to "actual" damages. For the reasons we have stated, the negligence standard gives insufficient breathing space to First Amendment values. Limiting recovery to actual damages has the same defects. In the first instance, that standard, too, leaves the First Amendment insufficient elbow room within which to function. It is not simply the possibility of a judgment for damages which results in self-censorship. The very possibility of having to engage in litigation, an expensive and protracted process, is threat enough to cause discussion and debate to "steer far wider of the unlawful zone" thereby keeping protected discussion from public cognizance. *Speiser* v. *Randall*, 357 U. S. 513, 526 (1958). Cf. *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Found.*, — U. S. —, [21]–[29] (1971). Too, a small newspaper suffers equally from a substantial damage award, whether the label of the award be "actual" or "punitive."

The real thrust of Brothers HARLAN and MARSHALL'S position, however, is their assertion that their proposal will not "constitutionalize" the factfinding process. But this clearly is not the way their test would work in practice. Their approach means only that factfinding will shift from an inquiry into whether the defamatory state-

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less falsity. That burden, and no more, is the plaintiff's whether "public official," "public figure," or "little man." It may be that jury instructions that are couched only in terms of knowing or reckless falsity, and omit reference to "actual malice," would further a proper application of the *Times* standard to the evidence.

ments were knowingly or recklessly uttered to the inquiry whether they were negligently uttered, and if so, to an inquiry whether plaintiff suffered "actual" damages. This latter inquiry will involve judges even more deeply in factfinding. Would the mere announcement by a state legislature that embarrassment and pain and suffering are measurable actual losses mean that such damages may be awarded in libel actions? No matter how the problem is approached, this Court would ultimately have to fashion constitutional definitions of "negligence" and of "actual damages."

Aside from these particularized considerations, we have repeatedly recognized that courts may not avoid an excursion into factfinding in this area simply because it is time consuming or difficult. We stated in *Pennekamp* v. *Florida*, 328 U. S. 331, 335 (1946), that:

> "The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they . . . are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." (Footnote omitted).

Clearly, then, this Court has an "obligation to test challenged judgments against the guarantees of the First and Fourteenth Amendments," and in doing so "this Court cannot avoid making an independent constitutional judgment on the facts of the case." *Jacobellis* v. *Ohio*, 378 U. S. 184, 190 (1964). The simple fact is that First Amendment questions of "constitutional fact" compel this Court's *de novo* review. See *Edwards* v. *South*

Carolina, 372 U. S. 229, 235 (1963); *Blackburn* v. *Alabama*, 361 U. S. 199, 205 n. 5 (1960).

VI

Petitioner argues that the instructions on punitive damages either cured or rendered harmless the instructions permitting an award of general damages based on a finding of failure of *WIP* to exercise reasonable care. We have doubts of the merits of the premise,[19] but even assuming that instructions were given satisfying the standard of knowing or reckless falsity, the evidence was insufficient to sustain an award for the petitioner under that standard. In these cases a court's "duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied." *New York Times Co. v. Sullivan*, 376 U. S., at 285. Our independent analysis of the record leads us to agree with the Court of Appeals that none of the proofs, considered either singly or cumulatively, satisfies the constitutional standard with the convincing clarity necessary to raise a jury question whether the defamatory

[19] The instructions authorized an award of punitive damages upon a finding that a falsehood "arose from a bad motive, or . . . that it was published with reckless indifference to the truth . . . punitive damages are awarded as a deterrent from future conduct of the same sort." App., at 333a. The summation of petitioner's counsel conceded that respondent harbored no ill-will toward petitioner, but, following the suggestion of the instructions that punitive damages are " 'smart' money," App., at 313a, argued that they should be assessed because "[respondent] must be careful the way they impart news information, and you can punish them if they weren't because you could say that was malicious." *Ibid.* This was an obvious invitation based on the instructions to award punitive damages for carelessness. Thus the jury was allowed, and even encouraged, to find malice and award punitive damages merely on the basis of negligence and bad motive.

falsehoods were broadcast with knowledge that they were false or with reckless disregard of whether they were false or not.

The evidence most strongly supporting petitioner is that concerning his visit to *WIP*'s studio where a part-time newscaster hung up the telephone when petitioner disputed the newscaster's statement that the District Attorney had characterized petitioner's magazines as obscene. This contact occurred, however, after all but one of the second series of broadcasts had been aired. The incident has no probative value insofar as it bears on petitioner's case as to the first series of broadcasts. That portion of petitioner's case was based upon the omission from the first two broadcasts at 6 and 6:30 p. m. on October 4 of the word "alleged" preceding a characterization of the magazines distributed by petitioner. But that omission was corrected with the 8 p. m. broadcast and was not repeated in the five broadcasts which followed. And we agree with the analysis of the Court of Appeals which led that court, and leads us, to conclude that the episode failed to provide evidence satisfying the *Times* standard insofar as it bore on petitioner's case based upon the broadcasts on and after October 21 concerning petitioner's law suit:

> "Only one broadcast took place after this conversation. It is attacked on the ground that it contains an inaccurate statement concerning plaintiff's injunction action in that it stated that the district attorney considered plaintiff's publications to be smut and immoral literature. The transcript of the testimony shows that plaintiff's own attorney, when questioning defendant's representative concerning the allegedly defamatory portion of the last broadcast, said that he was not questioning its 'accuracy'. Furthermore, his examination of the same witness

brought out that defendant's representative confirmed the story with the judge involved before the broadcast was made. We think that the episode failed to provide evidence of actual malice with the requisite convincing clarity to create a jury issue under federal standards." 415 F. 2d, at 897.

Petitioner argues finally that *WIP*'s failure to communicate with him to learn his side of the case and to obtain a copy of the magazine for examination, sufficed to support a verdict under the *Times* standard. But our "cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant* v. *Thompson*, 390 U. S., at 731. Respondent here relied on information supplied by police officials. Following petitioner's complaint about the accuracy of the broadcasts, *WIP* checked its last report with the judge who presided in the case. While we may assume that the District Court correctly held to be defamatory respondent's characterizations of petitioner's business as "the smut literature racket," and of those engaged in it as "girlie-book peddlers," there is no evidence in the record to support a conclusion that respondent "in fact entertained serious doubts as to the truth" of its reports.

Affirmed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 66.—October Term, 1970

George A. Rosenbloom, Petitioner, v. Metromedia, Inc. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[June 7, 1971]

Mr. Justice Black, concurring in the judgment.

I concur in the judgment of the Court for the reasons stated in my concurring opinion in *New York Times* v. *Sullivan*, 376 U. S. 254, 293 (1964), in my concurring and dissenting opinion in *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 170 (1967), and in Mr. Justice Douglas' concurring opinion in *Garrison* v. *Louisiana*, 379 U. S. 64, 80 (1964). I agree of course that First Amendment protection extends to "all discussion and communication involving matters of legitimate public concern, without regard to whether the persons involved are famous or anonymous." *Ante*, at —. However, in my view, the First Amendment does not permit the recovery of libel judgments against the news media even when statements are broadcast with knowledge they are false. As I stated in *Curtis Publishing Co.* v. *Butts*, *supra*, "[I]t is time for this Court to abandon *New York Times Co.* v. *Sullivan* and adopt the rule to the effect that the First Amendment was intended to leave the press free from the harassment of libel judgments." *Id.*, at 172.

SUPREME COURT OF THE UNITED STATES

No. 66.—October Term, 1970

George A. Rosenbloom, Petitioner, *v.* Metromedia, Inc.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[June 7, 1971]

Mr. Justice White, concurring in the judgment.

I

Under existing law the First Amendment is deemed to permit recoveries for damaging falsehoods published about public officials or public figures only if the defamation is knowingly or recklessly false. But until today the First Amendment has not been thought to prevent citizens who are neither public officials nor public figures from recovering damages for defamation upon proving publication of a false statement injurious to their reputation. There has been no necessity to show deliberate falsehood, recklessness, or even negligence.

The Court has now decided that the First Amendment requires further restrictions on state defamation laws. Mr. Justice Brennan and two other members of the Court would require proof of knowing or reckless misrepresentation of the facts whenever the publication concerns a subject of legitimate public interest, even though the target is a "private" citizen. Only residual areas would remain in which a lower degree of proof would obtain.

Three other members of the Court also agree that private reputation has enjoyed too much protection and the media too little. But in the interest of protecting reputation, they would not roll back state laws so far.

They would interpret the First Amendment as proscribing liability without fault and would equate non-negligent falsehood with faultless conduct. The burden of the damaging lie would be shifted from the media to the private citizen unless the latter could prove negligence or some higher degree of fault. They would also drastically limit the authority of the States to award compensatory and punitive damages for injury to reputation.

MR. JUSTICE BLACK, consistently with the views that he and MR. JUSTICE DOUGLAS have long held, finds no room in the First Amendment for any defamation recovery whatsoever.

Given this spectrum of proposed restrictions on state defamation laws and assuming that MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS will continue in future cases to support the severest of the restrictions, it would seem that at least five members of the Court would support each of the following rules:

For public officers and public figures to recover for damage to their reputations for libelous falsehoods, they must prove either knowing or reckless disregard of the truth. All other plaintiffs must prove at least negligent falsehood, but if the publication about them was in an area of legitimate public interest, then they too must prove deliberate or reckless error. In all actions for libel or slander, actual damages must be proved, and awards of punitive damages will be strictly limited.

II

For myself, I cannot join any of the opinions filed in this case. Each of them decides broader constitutional issues and displaces more state libel law than is necessary for the decision in this case. As I have said, MR. JUSTICE BRENNAN would extend the privilege enunciated in *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), to publications upon any "subject of legitimate public inter-

est." See *ante*, at ——. He would thereby extend the constitutional protection to false and damaging, but non-malicious publications about such matters as the health and environmental hazards of widely used manufactured products, the mental and emotional stability of executives of business establishments, and the racial and religious prejudices of many groups and individuals. All of these are, of course, subjects of real concern and arguments for placing them within the scope of *New York Times* are by no means frivolous.

For MR. JUSTICE MARSHALL and MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN's opinion is both too severe and too limited. They would make more sweeping incursions into state tort law but purportedly with less destructive weapons. They would permit suit by some plaintiffs barred under MR. JUSTICE BRENNAN's opinion, but would require all plaintiffs to prove at least negligence before any recovery would be allowed.

I prefer at this juncture not to proceed on such a broad front. I am quite sure that *New York Times Co. v. Sullivan* was the wiser course, but I am unaware that state libel laws with respect to private citizens have proved a hazard to the existence or operations of the communications industry in this country. The Court seems haunted by fears of self-censorship by the press and of damage judgments that will threaten its financial health. But technology has immeasurably increased the power of the press to do both good and evil. Vast communication combines have been built into profitable ventures. My interest is not in protecting the treasuries of communicators but in implementing the First Amendment by insuring that effective communication which is essential to the continued functioning of our free society. I am not aware that self-censorship has caused the press to tread too gingerly in reporting "news" concerning private citizens and private affairs or that the reputation of

private citizens has received inordinate protection from falsehood. I am not convinced that we must fashion a constitutional rule protecting a whole range of damaging falsehoods and so shift the burden from those who publish to those who are injured.

I say this with considerable deference since all my Brethren have contrary views. But I would not nullify a major part of state libel law until we have given the matter the most thorough consideration and can articulate some solid First Amendment grounds based on experience and our present condition. As it is, today's experiment rests almost entirely on theoretical grounds and represents a purely intellectual derivation from what are thought to be important principles of tort law as viewed in the light of the primacy of the written and spoken word.

This case lends itself to more limited adjudication. *New York Times Co.* v. *Sullivan* itself made clear that discussion of the official actions of public servants such as the police is constitutionally privileged. "The right of free public discussion of the stewardship of public officials" is, in the language of that case, "a fundamental principle of the American form of government." 376 U. S., at 275. Discussion of the conduct of public officials cannot, however, be subjected to artificial limitations designed to protect others involved in an episode with officials from unfavorable publicity. Such limitations would deprive the public of full information about the official action which took place. In the present case, for example, the public would learn nothing if publication only of the fact that the police made an arrest were permitted; it is also necessary that the grounds for the arrest and, in many circumstances, the identity of the person arrested be stated. In short, it is rarely informative for a newspaper or broadcaster to state merely that officials

acted unless he also states the reasons for their action and the persons whom their action affected.

Nor can *New York Times* be read as permitting publications that invade the privacy or injure the reputations of officials, but forbidding those that invade the privacy or injure the reputations of private citizens against whom official action is directed. *New York Times* gives the broadcasting media and the press the right not only to censure and criticize officials but also to praise them and the concomitant right to censure and criticize their adversaries. To extend constitutional protection to criticism only of officials would be to authorize precisely that sort of thought control which the First Amendment forbids government to exercise.

I would accordingly hold that in defamation actions, absent actual malice as defined in *New York Times Co.* v. *Sullivan*, the First Amendment gives the press and the broadcast media a privilege to report and comment upon the official actions of public servants in full detail, with no requirement that the reputation or the privacy of an individual involved in or affected by the official action be spared from public view. Since respondent Metromedia did nothing more in the instant case, I join with the Court in holding its broadcasts privileged. I would not, however, adjudicate cases not now before the Court.

SUPREME COURT OF THE UNITED STATES

No. 66.—October Term, 1970

George A. Rosenbloom, Petitioner, v. Metromedia, Inc. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[June 7, 1971]

Mr. Justice Harlan, dissenting.

The very facts of this case demonstrate that uncritical acceptance of the Pennsylvania libel law here involved would be inconsistent with those important First and Fourteenth Amendment values we first treated with in an analogous context in *New York Times* v. *Sullivan*, 376 U. S. 254 (1964). However, as the plurality opinion implicitly recognizes, only an undiscriminating assessment of those values would lead us to extend the *New York Times* rule in full force to all purely private libels. My Brother Brennan's opinion would resolve the dilemma by distinguishing those private libels that arise out of events found to be of "public or general concern" from those that do not, and subjecting the former to full-scale application of the *New York Times* rule.

For the reasons set forth in Part I of my Brother Marshall's dissent, I cannot agree to such a solution. As he so well demonstrates, the principal failing of the plurality opinion is its inadequate appreciation of the limitations imposed by the legal process in accommodating the tension between state libel laws and the federal constitutional protection given to freedom of speech and press.

Once the evident need to balance the values underlying each is perceived, it might seem, purely as an abstract

matter, that the most utilitarian approach would be to scrutinize carefully every jury verdict in every libel case, in order to ascertain whether the final judgment leaves fully protected whatever First Amendment values [1] transcend the legitimate state interest in protecting the particular plaintiff who prevailed. This seems to be what is done in the plurality opinion. But we did not embrace this technique in *New York Times, supra.* Instead, as my Brother MARSHALL observes, we there announced a rule of general application, not ordinarily dependent for its implementation upon a case-by-case examination of trial court verdicts. See also my dissent in *Time, Inc.* v. *Pape,* — U. S. —, — (1971). Nor do I perceive any developments in the seven years since we decided *New York Times, supra,* that suggest our original method should now be abandoned. At least where we can discern generally applicable rules that should balance with fair precision the competing interests at stake, such rules should be preferred to the plurality's approach both in order to preserve a measure of order and predictability in the law that must govern the daily conduct of affairs and to avoid subjecting the press to judicial second-guessing of the newsworthiness of each item they print. Consequently, I fully concur in Part I of MR. JUSTICE MARSHALL'S dissent.

Further, I largely agree with the alternative proposals of that dissent. I, too, think that, when dealing with private libel, the States should be free to define for themselves the applicable standard of care so long as they

[1] Of course, for me, this case presents a Fourteenth, not a purely First, Amendment issue, for the question is one of the constitutionality of the applicable Pennsylvania libel laws. However, I have found it convenient, in the course of this opinion, occasionally to speak directly of the First Amendment as a short-hand phrase for identifying those constitutional values of freedom of expression guaranteed to individuals by the Due Process Clause of the Fourteenth Amendment.

do not impose liability without fault; that a showing of actual damage should be a requisite to recovery for libel; and that it is impermissible, given the substantial constitutional values involved, to fail to confine the amount of jury verdicts in such cases within any ascertainable limits. However, my reasons for so concluding are somewhat different than his, and I therefore reach a different result than he does with respect to the tolerable limits of punitive damages.

I

I think we all agree on certain core propositions. First, as a general matter, the States have a perfectly legitimate interest, exercised in a variety of ways, in redressing and preventing careless conduct, no matter who is responsible for it, that inflicts actual, measurable injury upon individual citizens. Secondly, there is no identifiable value worthy of constitutional protection in the publication of falsehoods. Third, although libel law provides that truth is a complete defense, that principle, standing alone, is insufficient to satisfy the constitutional interest in freedom of speech and press. For we have recognized that it is inevitable that there will be "some error in the situation presented in free debate," *Time, Inc.* v. *Hill*, 385 U. S. 374, 406 (1967) (opinion of this writer), a process that needs "breathing space," *NAACP* v. *Button*, 371 U. S. 415, 433 (1963), to flourish, and that "putting to the pre-existing prejudices of a jury the determination of what is 'true' may effectively institute a system of censorship." *Time, Inc.* v. *Hill, supra*, at 406.

Moreover, any system that punishes certain speech is likely to induce self-censorship by those who would otherwise exercise their constitutional freedom. Given the constitutionally protected interest in unfettered speech, it requires an identifiable, countervailing state interest, consistent with First Amendment values, to justify a

regulatory scheme that produces such results. And, because the presence of such values dictates closer scrutiny of this aspect of state tort law than the Fourteenth Amendment would otherwise command, it may well be that certain rules, impervious to constitutional attack when applied to ordinary human conduct, may have to be altered or abandoned where used to regulate speech. Finally, as determined in *New York Times*, the constitutional interest in tolerance of falsehood as well as the need to adjust competing societal interests, prohibits, at a minimum, the imposition of liability without fault.

The precise standard of care necessary to achieve these goals is, however, a matter of dispute as is the range of penalties a State may prescribe for a breach of that standard. In analyzing these problems it is necessary to begin with a general analytical framework that defines those competing interests that must be reconciled. My Brother MARSHALL's opinion, I think, dwells too lightly upon the nature of the legitimate countervailing interests promoted by the State's libel law and, as a result, overstates the case against punitive damages. Because we deal with a set of legal rules that treat truth as a complete defense it strikes, I think, somewhat wide of the mark to treat the State's interest as one of protecting reputations from "unjustified invasion." Opinion, at 1. By hypothesis, the respondent here was free to reveal any true facts about petitioner's "obscure private life."[2]

Given the defense of truth, it is my judgment that, in order to assure that it promotes purposes consistent with First Amendment values, the legitimate function of libel law must be understood as that of compensating

[2] I would expressly reserve, for a case properly presenting it, the issue whether the *New York Times* rule should have any effect on "privacy" litigation. The problem is briefly touched upon in *Time, Inc. v. Hill*, 385 U. S. 374, 404–405 (1967) (HARLAN, J., concurring and dissenting).

individuals for actual, measurable harm caused by the conduct of others. This can best be demonstrated by postulating a law that subjects publishers to jury verdicts for falsehoods that have done the plaintiff no harm. In my view, such a rule can only serve a purpose antithetical to those of the First Amendment. It penalizes speech, not to redress or avoid the infliction of harm, but only to deter the press from publishing material regarding private behavior that turns out to be false simply because of its falsity. This the First Amendment will not tolerate. Where the State cannot point to any tangible danger, even knowingly erroneous publication is entitled to constitutional protection because of the interest in avoiding an inquiry into the mere truth or falsity of speech. Moreover, such a scheme would impose a burden on speaking not generally placed upon constitutionally unprotected conduct—the payment of private fines for conduct which, although not conformed to established limits of care, causes no harm in fact.

Conversely, I think that where the purpose and effect of the law is to redress actual and measurable injury to private individuals that was reasonably foreseeable as a result of the publication, there is no necessary conflict with the values of freedom of speech. Just as an automobile negligently driven can cost a person his physical and mental well-being and the fruits of his labor, so can a printing press negligently set. While the First Amendment protects the press from the imposition of special liabilities upon it, "[t]o exempt a publisher, because of the nature of his calling, from an imposition generally exacted from other members of the community, would be to extend a protection not required by the constitutional guarantee." *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 160 (1967) (opinion of this writer). A business "is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special

immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others." *Associated Press* v. *NLRB*, 301 U. S. 103, 132–133 (1937). That the damage has been inflicted by words rather than other instrumentalities cannot insulate it from liability. States may legitimately be required to use finer regulatory tools where dealing with "speech," but they are not wholly disabled from exacting compensation for its measurable adverse consequences. If this is not so, it is difficult to understand why governments may, for example, proscribe "misleading" advertising practices or specify what is "true" in the dissemination of consumer credit advertisements.

Nor does this interest in compensating victims of harmful conduct somehow disappear when the damages inflicted are great. So long as the effect of the law of libel is simply to make publishers pay for the harm they cause, and the standard of care required is appropriately adjusted to take account of the special countervailing interests in an open exchange of ideas, the fact that this may involve the payment of substantial sums cannot plausibly be said to raise serious First Amendment problems. If a newspaper refused to pay its bills because to do so would put it out of business, would the First Amendment dictate that this be treated as a partial or complete defense? If an automobile carrying a newsman to the scene of a history-making event ran over a pedestrian, would the size of the verdict, if based upon generally applicable tort law principles, have to be assessed against the probability that it would deter broadcasters from news gathering before it could pass muster under the First Amendment?

However, without foreclosing the possibility that other limiting principles may be surfaced by subsequent experience, I do think that since we are dealing, by hypothesis, with infliction of harm through the exer-

cise of freedom of speech and the press to which the Constitution gives explicit protection, recoverable damages must be limited to those consequences of the publication which are reasonably foreseeable. The usual tort rule seems to be that once some foreseeable injury has been inflicted, the negligent defendant must compensate for all damages he proximately caused in fact, no matter how peculiar were the circumstances of the particular plaintiff involved. Prosser, The Law of Torts § 50 (1964). However, our cases establish, I think, that, unless he has knowledge to the contrary, a speaker is entitled to presume that he is addressing an audience that is not especially susceptible to distress at the specter of open, uninhibited, robust speech. *Cohen* v. *California*, — U. S. — (1971). See also *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969); *Butler* v. *Michigan*, 352 U. S. 380 (1957). Thus, I think the speaker should be free from a duty to compensate for actual harm inflicted by his falsehoods where the defamation would not have caused such harm to a person of average sensibilities unless, of course, the speaker knew that his statements were made concerning an unusually sensitive person. In short, I think the First Amendment does protect generally against the possibility of self-censorship in order to avoid unwitting affronts to the frail and the queasy.

II

Of course, it does not follow that so long as libel law performs the same compensatory function as civil law generally it is necessarily legitimate in all its various applications. The presence of First Amendment values means that the State can be compelled to utilize finer, more discriminating instruments of regulation where necessary to give more careful protection to these countervailing interests. *New York Times, supra,* and *Curtis Publishing, supra,* established that where the injured

party is a "public figure" or a "public official," the interest in freedom of speech dictates that the States forgo their interest in compensating for actual harm, even upon a basis generally applicable to all members of society, unless the plaintiff can show that the injurious publication was false and was made "with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times, supra,* at 280. Tacitly recognizing that it would unduly sacrifice the operative legitimate state interests to extend this rule to all cases where the injured party is simply a private individual, the plurality opinion would nevertheless apply it where the publication concerned such a person's "involvement in an event of public or general concern." *Ante,* at 22. I would not overrule *New York Times* or *Curtis Publishing* and I do agree, as indicated above, that making liability turn on simple falsity in the purely private libel area is not constitutionally permissible. But I would not construe the Federal Constitution to require that the States adhere to a standard other than that of reasonable care where the plaintiff is an ordinary citizen.

My principal concern with the plurality's view, of course, is that voiced by my Brother MARSHALL. However, even if this objection were not tenable, unlike the plurality, I do think there is a difference, relevant to the interests here involved, between the public and the private plaintiff, as our cases have defined these categories, and that maintaining a constitutional distinction between them is at least as likely to protect true First Amendment concerns as one that eradicates such a line and substitutes for it a distinction between matters we think are of true social significance and those we think are not.

To begin, it does no violence, in my judgment, to the value of freedom of speech and press to impose a duty of reasonable care upon those who would exercise these freedoms. I do not think it can be gainsaid that the

States have a substantial interest in encouraging speakers to carefully seek the truth before they communicate, as well as in compensating persons actually harmed by false descriptions of their personal behavior. Additionally, the burden of acting reasonably in taking action that may produce adverse consequences for others is one generally placed upon all in our society. Thus, history itself belies the argument that a speaker must somehow be freed of the ordinary constraints of acting with reasonable care in order to contribute to the public good while, for example, doctors, accountants, and architects have constantly performed within such bounds.

This does not mean that I do not agree with the rule of *New York Times, supra,* but only that I deem it inapplicable here. That rule was not, I think, born solely of a desire to free speech that would otherwise have been stifled by overly restrictive rules, but also rested upon a determination that the countervailing state interests, described above, were not fully applicable where the subject of the falsehood was a public official or a public figure. For me, it does seem quite clear the the public person has a greater likelihood of securing access to channels of communication sufficient to rebutt falsehoods concerning him than do private individuals in this country who do not toil in the public spotlight. Similarly, our willingness to assume that public personalities are more impervious to criticism, and may be held to have run the risk of publicly circulated falsehoods concerning them, does not rest solely upon an empirical assertion of fact, but also upon a belief that, in our political system, the individual speaker is entitled to act upon such an assumption if our institutions are to be held up, as they should be, to constant scrutiny. And, at least as to the "public official," it seems to be universally the case that he is entitled to an absolute immunity for what he may utter in response to the charges of others.

Where such factors are present the need to provide monetary compensation for defamation appears a good deal more attenuated. Finally, in light of the plurality opinion's somewhat extravagant delineation of the public interest involved in the dissemination of information about nonpublic persons, it bears emphasizing that a primary rationale for extending the *New York Times* rule to public figures was the desire to reflect, in the constitutional balance, the fact that "in this country, the distinctions between governmental and private sectors are blurred," *Curtis Publishing*, *supra*, at 163 (opinion of Warren, C. J.), and to treat constitutional values as specially implicated where important, albeit nonofficial, policy and behavior was the subject of discussion. At the very least, this tends to diminish the force of any contention that libelous depictions of nonpublic persons are often likely to involve matters of abiding public significance.

I cannot agree that the First Amendment gives special protection to the press from "[t]he very possibility of having to engage in litigation," *ante*, at 23 (opinion of BRENNAN, J.). Were this assertion tenable, I do not see why the States could ever enforce their libel laws. Cf. my Brother BLACK's opinion, *ante*, at —. Further, it would certainly cast very grave doubts upon the constitutionality of so-called "right of reply statutes" advocated by the plurality, *ante*, at 17, n. 15, and ultimately treat the application of any general law to a publisher or broadcaster as an important First Amendment issue. The notion that such an interest, in the context of a purely private libel, is a significant independent constitutional value is an unfortunate consequence of the plurality's single-minded devotion to the task of preventing self-censorship, regardless of the purposes for which such restraint is induced or the evils its exercise tends to avoid.

It is, then, my judgment that the reasonable care standard adequately serves those First Amendment values that must inform the definition of actionable libel and that those special considerations that made even this standard an insufficiently precise technique when applied to plaintiffs who are "public officials" or "public figures" do not obtain where the litigant is a purely private individual.

III

There remains the problem of punitive damages.[3] No doubt my Brother MARSHALL is correct in asserting that the specter of being forced to pay out substantial punitive damage awards is likely to induce self-censorship. This would probably also be the case where the harm actually caused is likely to be great. But, as I indicated above, this fact in itself would not justify construing the First Amendment to impose an arbitary limitation on the amount of actual damages recoverable. Thus, as my Brother MARSHALL would apparently agree—since he, too, proposes no limitation on actual damages—one cannot jump from the proposition that fear of substantial punitive damage awards may be an important factor in inducing self-censorship directly to the result that punitive damages cannot be assessed in all private libel cases. A more particularized inquiry into the nature of the competing interests involved is necessary in order to

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[3] The conclusions I reach in Part III of this opinion are somewhat different than those I embraced four Terms ago in *Curtis Publishing Co.*, *supra*, at 159–161. Where matters are in flux, however, it is more important to re-think past conclusions than to adhere to them without question and the problem under consideration remains in a state of evolution, as is attested to by all the opinions filed today. Reflection has convinced me that my earlier opinion painted with somewhat too broad a brush and that a more precise balancing of the conflicting interests involved is called for in this delicate area.

ascertain whether awarding punitive damages must inevitably, in private libel cases, serve only interests that are incompatible with the First Amendment.

At a minimum, even in the purely private libel area, I think the First Amendment should be construed to limit the imposition of punitive damages to those situations where actual malice is proved. This is the typical standard employed in assessing anyone's liability for punitive damages where the underlying aim of the law is to compensate for harm actually caused, see, *e. g.*, 3 L. Frumer, et al., Personal Injury § 2.02 (1965); H. Oleck, Damages to Persons and Property § 30 (1955), and no conceivable state interest could justify imposing a harsher standard on the exercise of those freedoms that are given explicit protection by the First Amendment.

The question then arises whether further limitations on this general state power must be imposed in order to serve the particularized goals of the First Amendment. The most compelling rationale for providing punitive damages where actual malice is shown is that such damages assure that deterrent force is added to the jury's verdict. If the speaker's conduct was quite likely to produce substantial harm, but fortuitously did not, simple assessment of actual damages will not fully reflect the social interest in deterring that conduct generally. Further, even if the harm done was great the defendant may have unusually substantial resources that make the award of actual damages a trivial inconvenience of no actual deterrent value. And even where neither of these factors obtains, the State always retains an interest in punishing more severely conduct that, although it causes the same effect, is more morally blameworthy. For example, consider the distinction between manslaughter and first-degree murder.

I find it impossible to say, at least without further judicial experience in this area, that the First Amendment

interest in avoiding self-censorship will always outweigh the state interest in vindicating these policies. It seems that a legislative choice is permissible which, for example, seeks to induce, through a reasonable monetary assessment, repression of false materials, published with actual malice, that is demonstrably harmful and reasonably thought capable of causing substantial harm, but, in fact, was not so fully injurious to the individual attacked. Similarly, the State surely has a legitimate interest in seeking to assure that its system of compensating victims of negligent behavior also operates upon all as an inducement to avoidance of such conduct. And, these are burdens that are placed on all members of society, thus permitting the press to escape them only if its interest is somehow different in this regard.

However, from the standpoint of the individual plaintiff such damage awards are windfalls. They are, in essence, private fines levied for purposes that may be wholly unrelated to the circumstances of the actual litigant. That fact alone is not, I think, enough to condemn them. The State may, as it often does, use the vehicle of a private lawsuit to serve broader public purposes. It is noteworthy that my Brother MARSHALL does not rest his objection to punitive damages upon these grounds. He fears, instead, the self-censorship that may flow from the unbridled discretion of juries to set the amount of such damages. I agree that where these amounts bear no relationship to the actual harm caused, they then serve essentially as springboards to jury assessment, without reference to the primary legitimating compensatory function of the system, of an infinitely wide range of penalties wholly unpredictable in amount at the time of the publication and that this must be a substantial factor in inducing self-censorship. Further, I find it difficult to fathom why it may be necessary, in order to achieve its justifiable deterrence goals, for the States to permit puni-

tive damages that bear no discernible relationship to the actual harm caused by the publication at issue. A rational determination of the injury a publication might potentially have inflicted should typically proceed from the harm done in fact. And where the compensatory scheme seeks to achieve deterrence as a subsidiary by-product, the desired deterrence, if not precisely measured by actual damages, should be informed by that touchstone if deterrence of falsehood is not to replace compensation for harm as the paramount goal. Finally, while our legal system does often mete out harsher punishment for more culpable acts, it typically begins with a gradation of offenses defined in terms of effects. Compare, for example, larceny with murder. It is not surprising, then, that most States apparently require that punitive damages in most private civil actions bear some reasonable relation to the actual damage awarded, H. Oleck, *supra* § 275, Pennsylvania included, *Weider* v. *Hoffman*, 238 F. Supp. 437, 444–447 (MD Pa. 1965).

However, where the amount of punitive damages awarded bears a reasonable and purposeful relationship to the actual harm done, I cannot agree that the Constitution must be read to prohibit such an award. Indeed, as I understand it, my Brother MARSHALL's objection to my position [4] is not that the interest in freedom of speech dictates eliminating such judgments, but that this result is compelled by the need to avoid involving courts in an "ad hoc balancing" of "the content of the speech and the surrounding circumstances," Opinion, at 8, much like that undertaken today in Part VI of the plurality opinion,

[4] Of course, I do not envision that, consistently with my views, the States could only exact some predetermined multiple of the actual damages found. I should think a jury could simply be instructed, along the lines set out in my opinion, on the legitimate uses of the punitive damage award and the necessity for relating any such judgment to the harm actually done.

the same technique criticized in my dissent in *Time, Inc.* v. *Pape, supra.* I find this argument unpersuasive. First, I do not see why my proposed rule would necessarily require frequent judicial reweighing of the facts underlying each jury verdict. A carefully and properly instructed jury should ordinarily be able to arrive at damage awards that are self-validating. It is others, not I, who have placed upon the federal courts the general duty of reweighing jury verdicts regarding the degree of fault demonstrated in libel actions. Further, to the extent that supervision of jury verdicts would be required it would entail a different process than that undertaken where judges redetermine the degree of fault. The defendant's resources, the actual harm suffered by the plaintiff, and the publication's potential for actual harm are all susceptible of more or less objective measurement. And the overriding principle that deterrence is not to be made a substitute for compensation should serve as a useful mechanism for adjusting the equation. Finally, even if some marginal "ad hoc balancing" becomes necessary, I should think it the duty of this Court at least to attempt to implement such a process before preempting, for itself, all state power in this regard.[5]

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[5] The plurality opinion states that the "real thrust" of my position is that it "will not 'constitutionalize' the factfinding process." *Ante,* at 23. In fact, I have attempted to demonstrate throughout this opinion that I believe the positions of my Brothers BRENNAN, BLACK, and MARSHALL all, in varying degrees, overstate the extent to which libel law is incompatible with the constitutional guarantee of freedom of expression, and have pointed out that I think my views have merit "even if [the objection noted by the plurality] were not tenable." *Supra,* at 8. Moreover, the assertion that an inquiry into whether actual damages were suffered "will involve judges even more deeply in factfinding," *ante,* at 24, than ascertaining whether "the defendant in fact entertained serious doubts as to the truth of

In sum, given the fact that it seems to reflect the majority rule, that most of our jurisprudence proceeds upon the premise that legislative purposes can be achieved by fitting the punishment to the crime, and since we deal here with a precise constitutional interest that may legitimately require the States to resort to more discriminating regulation within a more circumscribed area of permissible concern, I would hold unconstitutional, in a private libel case, jury authority to award punitive damages which is unconfined by the requirement that these awards bear a reasonable and purposeful relationship to the actual harm done. Conversely, where the jury authority has been exercised within such constraints, and the plaintiff has proved that the speaker acted out of express malice, given the present state of judicial experience, I think it would be an unwarranted intrusion into the legitimate legislative processes of the States and an impermissibly broad construction of the First Amendment to nullify that state action.

Because the Court of Appeals adjudicated this case upon principles wholly unlike those suggested here, I would vacate the judgment below and remand the case for further proceedings consistent with the views expressed herein.

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his publication," *ante*, at 27, or whether the publication involved "an event of public or general concern," *ante*, at 22, seems to me to carry its own refutation. The former focuses on measurable, objective fact; the latter upon subjective, personal belief. Finally, I cannot see why juries may not typically be entrusted responsibly to determine whether a publisher was negligent, a function they perform in judging the harmful conduct of most other members of society; or why it should be materially more difficult for judges to oversee such decisions where a speaker, rather than any other actor, is a defendant.

SUPREME COURT OF THE UNITED STATES

No. 66.—October Term, 1970

George A. Rosenbloom, Petitioner, *v.* Metromedia, Inc. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[June 7, 1971]

Mr. Justice Marshall, with whom Mr. Justice Stewart joins, dissenting.

Here, unlike the other cases involving the *New York Times*[1] doctrine, we are dealing with an individual who held no public office, who had not taken part in any public controversy, and who lived an obscure private life.[2] George Rosenbloom, before the events and reports of the events involved here, was just one of the millions of Americans who live their lives in obscurity.

The protection of the reputation of such anonymous persons "from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (Stewart, J., concurring). But the concept of a citizenry informed by a free and unfettered press is also basic to our system of ordered liberty. Here these two essential and fundamental values conflict.

I

The plurality has attempted to resolve the conflict by creating a conditional constitutional privilege for defama-

[1] *New York Times* v. *Sullivan*, 376 U. S. 254 (1964).

[2] See, *e. g.*, *Associated Press* v. *Walker*, 388 U. S. 130 (1967); *Curtis Pub. Co.* v. *Butts*, 388 U. S. 130 (1967); *Beckley Newspaper Corp.* v. *Hanks*, 389 U. S. 81 (1967); *Greenbelt Publ. Assn.* v. *Bresler*, 398 U. S. 6 (1970); *Rosenblatt* v. *Baer*, 383 U. S. 75 (1966).

tion published in connection with an event that is found to be of "public or general concern." The condition for the privilege is that the defamation must not be "published with knowledge that it was false or with reckless disregard of whether it was false or not." I believe that this approach offers inadequate protection for both of the basic values that are at stake.

In order for particular defamation to come within the privilege there must be a determination that the event was of legitimate public interest. That determination will have to be made by courts generally and, in the last analysis, by this Court in particular. Courts, including this one, are not anointed with any extraordinary prescience. But, assuming that under the rule announced by MR. JUSTICE BRENNAN for the plurality, courts are not simply to take a poll to determine whether a substantial portion of the population is interested or concerned in a subject, courts will be required to somehow pass on the legitimacy of interest in a particular event or subject; what information is relevant to self-government. See *Whitney* v. *California*, 274 U. S. 357, 375 (1926) (Brandeis, J., concurring). The danger such a doctrine portends for freedom of the press seems apparent.

The plurality's doctrine also threatens society's interest in protecting private individuals from being thrust into the public eye by the distorting light of defamation. This danger exists since all human events are arguably within the area of "public or general concern." My Brother BRENNAN does not try to provide guidelines or standards by which courts are to decide the scope of public concern. He does, however, indicate that areas exist that are not the proper focus of public concern, and cites *Griswold* v. *Connecticut*, 381 U. S. 479 (1965). But it is apparent that in an era of a dramatic threat of overpopulation and one in which previously accepted standards of conduct are widely heralded as outdated,

even the intimate and personal concerns with which the Court dealt in that case cannot be said to be outside the area of "legitimate public concern."

The threats and inadequacies of using the plurality's conditional privilege to resolve the conflict between the two basic values involved here have been illustrated by the experience courts have had in trying to deal with the right of privacy. See Cohen, A New Niche For the Fault Principle: A Forthcoming Newsworthiness Privilege in Libel Cases?, 18 U. C. L. A. L. Rev. 371, 379–381 (1970); Kalven, Privacy in Tort Law—Were Warren and Brandeis Wrong?, 31 Law and Contemp. Problems 326, 336 (1966). The authors of the most famous of all law review articles recommended that no protection be given to privacy interests when the publication dealt with a "matter which is of public or general interest." Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 214 (1890). Yet cases dealing with this caveat raise serious questions whether it has substantially destroyed the right of privacy as Warren and Brandeis envisioned it.[3] For example, the publication of a picture of the body of plaintiff's daughter immediately after her death in an automobile accident was held to be protected. *Kelley* v. *Post Publishing Co.*, 327 Mass. 275, 98 N. E. 2d 286 (1951). And the publication of the details of the somewhat peculiar behavior of a former child prodigy, who had a passion for obscurity, was found to involve a matter of public concern. *Sidis* v. *F-R Pub. Corp.*, 113 F. 2d 806 (CA2 1940).

In *New York Times* the Court chose to balance the competing interest by seeming to announce a generally applicable rule. Here it is apparent that the general

[3] For cases in which the courts have protected the privacy of persons involved in dramatic public events see *Mau* v. *Rio Grande Oil, Inc.*, 28 F. Supp. 845 (ND Cal. 1939), and *Melvin* v. *Reid*, 112 Cal. App. 285, 297 P. 91 (4th Dist. 1931).

rule announced cannot have general applicability. The plurality's conditional privilege approach, when coupled with constitutionalizing of the factfinding process,[4] see Part VI of MR. JUSTICE BRENNAN's opinion, results in the adoption of an *ad hoc* balancing of the two interests involved. The Court is required to weigh the nuances of each particular circumstance on its scale of values regarding the relative importance of society's interest in protecting individuals from defamation against the importance of a free press. This scale may arguably be a more finely tuned instrument in a particular case. But whatever precision the ad hoc method supplies is achieved at a substantial cost in predictability and certainty. Moreover, such an approach will require this Court to engage in a constant and continuing supervision of defamation litigation throughout the country. See *Time, Inc.* v. *Pape*, — U. S. —, — (1971) (HARLAN, J., dissenting); *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 171 (BLACK, J., concurring).

Undoubtedly, ad hoc balancing may be appropriate in some circumstances that involve First Amendment problems. See, *e. g.*, *Bates* v. *City of Little Rock*, 361 U. S. 516 (1960); *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503 (1969). But in view of the shortcomings of my Brother BRENNAN's test, defamation of a private individual by the mass media is not one of the occasions for unfettered ad hoc balancing. A generally applicable resolution is available that promises to provide an adequate balance between the interest in protecting individuals from defamation and the equally basic interest in protecting freedom of the press.

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[4] See *Time, Inc.* v. *Pape*, — U. S. — (1971).

II

As the plurality recognizes here and has recognized as the basic premise of the *New York Times* principle, the threat that defamation law presents for the values encompassed in the concept of freedom of the press is that of self censorship.[5] Our notions of liberty require a free and vigorous press that presents what it believes to be information of interest or importance; not timorous, afraid of an error that leaves it open to liability for hundreds of thousands of dollars. The size of the potential judgment that may be rendered against the press must be the most significant factor in producing self censorship—a judgment like the one rendered against Metromedia would be fatal to many smaller publishers.[6]

The judgments that may be entered in defamation cases are unlike those that may be entered in most litigation since the bulk of the award is given to punish the defendant or to compensate for presumed damages. Here the jury awarded Mr. Rosenbloom $725,000 in punitive damages.[7] This huge sum was not given to compensate him for any injury but to punish Metromedia. The concept of punitive or exemplary damages was first articulated in *Huckle* v. *Money*, 2 Wils 206 (K. B. 1763)—one of the general warrant cases. There Lord Camden found that the power to award such damages was inherent in the jury's exercise of uncontrolled discretion in the awarding of damages. See 1 T. Sedgwich, Damages § 345–350 (9th ed. 1912). Today these damages are rationalized as a way to punish the wrongdoer and to ad-

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[5] *New York Times* v. *Sullivan*, 376 U. S. 254, 279 (1964).

[6] The jury awarded Mr. Rosenbloom $25,000 in general damages and $725,000 in punitive damages. The District Court reduced the punitive damages to $250,000 on remittitur.

[7] See n. 6, *supra*.

monish others not to err. See Morris, Punitive Damages In Tort Cases, 44 Harv. L. Rev. 1172 (1931). Thus they serve the same function as criminal penalties and are in effect private fines. Unlike criminal penalties, however, punitive damages are not awarded within discernible limits but can be awarded in almost any amount. Since there is not even an attempt to offset any palpable loss and since these damages are the direct product of the ancient theory of unlimited jury discretion, the only limit placed on juries in awarding punitive damages is that the damages not be "excessive" and in some jurisdictions, that they bear some relationship to the amount of compensatory damages awarded.[8] See H. Oleck, Damages to Persons and Property § 275, at 557–560 (1955). The manner in which unlimited discretion may be exercised is plainly unpredictable. And fear of the extensive awards that may be given under the doctrine must necessarily produce the impingement on freedom of the press recognized in *New York Times.*

In addition to the huge awards that may be given under the label of punitive or exemplary damages, other doctrines in the law of defamation allow substantial damages without even an offer of evidence that there was actually injury. See *Montgomery* v. *Dennison,* 363 Pa. 255, 69 A. 2d 520 (1949); Restatement of Torts § 621 (1938). These doctrines create a legal presumption that substantial injuries "normally flow" from defamation. There is no requirement that there be even an offer of proof that there was in fact financial loss, physical or emotional suffering, or that the plaintiff's standing in the

[8] Most jurisdiction in this country recognize the concept of punitive or exemplary damages. Four States—Illinois, Massachusetts, Nebraska, and Washington—apparently do not recognize the doctrine. In Louisiana and Indiana the doctrine has limited applicability. See H. Oleck, Damages to Persons and Property § 269, at 541 (1955).

community was diminished. The effect is to give juries essentially unlimited discretion and thus give the jury much the same power they exercise under the labels of punitive or exemplary damages. The impingement upon free speech is the same no matter what label is attached.

The unlimited discretion exercised by juries in awarding punitive and presumed damages compounds the problem of self-censorship that necessarily results from the awarding of huge judgments. This discretion allows juries to penalize heavily the unorthodox and the unpopular and exact little from others. Such free wheeling discretion presents obvious and basic threats to society's interest in freedom of the press. And the utility of the discretion in fostering society's interest in protecting individuals from defamation is at best vague and uncertain. These awards are not to compensate victims; they are only windfalls. Certainly, the large judgments that can be awarded admonish the particular defendant affected as well as other potential transgressors not to publish defamation. The degree of admonition—the amount of the judgment in relation to the defamor's means—is not, however, tied to any concept of what is necessary to deter future conduct nor is there even any way to determine that the jury has considered the culpability of the conduct involved in the particular case. Thus the essence of the discretion is unpredictability and uncertainty.

The threats to society's interest in freedom of the press that are involved in punitive and presumed damages can largely be eliminated by restricting the award of damages to proven, actual injuries. The jury's wide ranging discretion will largely be eliminated since the award will be based on essentially objective, discernable factors. And the self-censorship that results from the uncertainty created by the discretion as well as the self-censorship resulting from the fear of large judgments

themselves would be reduced. At the same time society's interest in protecting individuals from defamation will still be fostered. The victims of the defamation will be compensated for their real injuries. They will not be, however, assuaged far beyond their wounds. And, there will be a substantial although imprecise and imperfect admonition to avoid future defamation by imposing the requirement that there be compensation for actual damages.

My Brother HARLAN argues that it is unnecessary to go so far. Although he recognizes the dangers involved in failing "to confine jury verdicts . . . within any ascertainable limits," MR. JUSTICE HARLAN suggests that on a finding of actual malice punitive damages may be awarded if they "bear a reasonable and purposeful relation to the actual harm done." My Brother HARLAN envisions jurors being instructed [9] to consider the deterrent function of punitive damages and to try to gear the punitive damages awarded in some undetermined way to actual injury. Apparently, the jury under the supervision of the court would weigh the content of the speech and the surrounding circumstances—*inter alia*, the position of the plaintiff, the wealth of the defendant, and the nature of the instrument of publication—on the scale of their values and determine what amount is necessary in light of the various interests involved. Since there would be no objective standard by which to measure the jury's decision there would be no predetermined limit of jury discretion and all of the threats to freedom of the press

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[9] "[A] jury instruction is not abracadabra. It is not a magical incantation the slightest deviation from which will break the spell. Only its poorer examples are formalistic codes recited by a trial judge to please appellate masters. At its best, it is simple, rugged communication from a trial judge to a jury of ordinary people, entitled to be appraised in terms of its net effects." *Time, Inc.* v. *Hill*, 385 U. S. 374, 418 (1967) (Fortas, J., dissenting).

involved in such discretion would remain. The chant of some new incantation will of course provide clear authority for courts to substitute their values for the jury's and remake the decision. If this is what my Brother HARLAN envisions, he is merely moving the ad hoc balancing from the question of fault to the question of damages.

I believe that the appropriate resolution of the clash of societal values here is to restrict damages to actual losses. See, Hill, The Bill of Rights and the Supervisory Power, 69 Col. L. Rev. 181, 191 n. 62 (1969). Of course, damages can be awarded for more than direct pecuniary loss but they must be related to some proven harm. See Wright, Defamation, Privacy and the Public's Right to Know: A National Problem and a New Approach, 46 Tex. L. Rev. 630, 648 (1968). If awards are so limited in cases involving private individuals—persons first brought to public attention by the defamation that is the subject of the lawsuit—it will be unnecessary to rely, as both the plurality and to some extent MR. JUSTICE HARLAN do, on somewhat elusive concepts[10] of the degree of fault and unnecessary, for constitutional purposes, to engage in ad hoc balancing of the competing interests involved.[11] States would be essentially free to continue the evolution of the common law of defamation and to articulate whatever fault standard best suits the State's need.[12]

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[10] See n. 9, *supra*.

[11] Of course, reliance on limiting awards to compensation for actual loss will require some review of the facts of particular cases. But that review will be limited to essentially objectively determinable issues; the contents of the publication will not have to be considered.

[12] Leaving States free to impose liability when defamation is found to be the result of negligent conduct, should make it somewhat more likely that a private person will have a meaningful forum in which

The only constitutional caveat should be that absolute or strict liability like uncontrolled damages and private fines cannot be used.[13] The effect of imposing liability without fault is to place "the printed, written, or spoken word in the same class with the use of explosives or the keeping of dangerous animals." W. Prosser, The Law of Torts 792 (3d ed. 1964). Clearly, this is inconsistent with the concepts of freedom of the press.

Thus in this case I would reverse the judgment of the Court of Appeals for the Third Circuit and remand the case for a determination of whether Mr. Rosenbloom can show any actual loss.

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to vindicate his reputation. If the standard of care is higher, it would seem that publishers will be more likely to assert the defense of truth than simply contend that they did not breach the standard.

[13] Strict liability for defamation was first clearly established in *Jones* v. *E. Hulton & Co.*, 2 K. B. 444 (1909), aff'd 1910 A. C. 20. See Smith, Jones v. Hulton: Three conflicting Judicial Views As to a Question of Defamation, 60 U. Pa. L. Rev. 365, 461 (1912). The standard has been applied in many jurisdictions in this country. See, *e. g.*, *Upton* v. *Times-Democrat Pub. Co.*, 104 La. 141, 28 So. 970 (1900); *Landati* v. *Stea*, 44 R. I. 303, 117 A. 422 (1922); *Taylor* v. *Hearst*, 107 Cal. 262, 40 P. 392 (1896). See also III Restatement of Torts § 582 comment g (1938). Liability without fault has not been applied, however, in Pennsylvania. See *Summit Hotel Co.* v. *National Broadcasting Co.*, 336 Pa. 182, 8 A. 2d 302 (1939), 12 Purdon's Pa. Stat. § 1583 (1953).

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